

No. 12588

United States
Court of Appeals
for the Ninth Circuit.

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, Sixth Collection District
of California,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

RALPH W. SMITH,
JOHN MOORE ROBINSON,
ROBERT M. HIMROD,
650 S. Spring St.,
Los Angeles 15, Calif.

For Appellee:

ERNEST A. TOLIN,
United States Attorney,
E. H. MITCHELL,
EDWARD R. McHALE,
Assistants U. S. Attorney,
EUGENE HARPOLE,
JAMES D. PETTUS,
Special Attorneys, Bureau of Internal
Revenue,
600 U. S. Post Office & Court House
Bldg.,
Los Angeles 12, Calif. [2]

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 8060-PH Civil

MARGARET BRYAN SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, UNITED STATES
COLLECTOR OF INTERNAL REVENUE,
6TH COLLECTION DISTRICT, CALIFOR-
NIA,

Defendants.

COMPLAINT FOR REFUND OF OVERPAY-
MENT OF INCOME TAXES WRONG-
FULLY COLLECTED

Plaintiff complains of defendant and alleges:

I.

The grounds upon which the Court's jurisdiction
in this suit depends are as follows:

(a) This action arises under the Constitution of
the United States, and more especially under the
Fifth Amendment and the Sixteenth Amendment
to said Constitution, and under the laws of the
United States providing for internal revenue by
way of income taxes upon individuals, and more
especially under section 162 of the Internal Rev-
enue Code of the United States, as hereinafter ap-
pears.

(b) By this suit the plaintiff seeks to recover

from the defendant, Collector of Internal Revenue, \$13,872.61 as the unpaid balance of an overpayment of \$14,510.27 which was erroneously made by plaintiff to the defendant of a federal income tax, which tax [3] is claimed to have arisen under said laws of the United States and which was collected by said defendant from plaintiff upon alleged income claimed by defendant and by the Commissioner of Internal Revenue of the United States to have been received by her during the year 1944 and to have been includible as such in her income tax return for that year. Said defendant, at the time of such payment, was, ever since has been, and still now is, the duly appointed, qualified, and acting United States Collector of Internal Revenue for the 6th Collection District, California, he being still in said office, and an inhabitant and resident of the Southern District of California. Thereafter said sum was by him turned over to and deposited with the Treasurer of the United States. This suit is filed in support of a claim for such refund which was duly and timely filed, as hereinafter alleged; and this suit is timely brought, as hereinafter alleged.

II.

John B. Bryan died September 18, 1938, a resident of California, leaving a will, a true copy of which is set forth in Exhibit "A" constituting a part of Exhibit 1 hereto attached, which Exhibit 1 is a copy of said Claim for a Refund. On October 13, 1938, an order was duly given and made by the Superior Court for Los Angeles County, Califor-

nia, in a proceeding entitled in said Court "In the Matter of the Estate of" said deceased, whereby said will was duly admitted to probate. Thereafter, such proceedings were had in said Court in said matter that, on December 29, 1943, an order and decree was duly given and made by said Court, in the matter of said Estate, settling the 6th and final account of the Executors of said will and directing a final distribution of said estate, a copy of which said order and decree is set forth in Exhibit "B" constituting a part of said Exhibit I hereto attached. In and by said order and decree of distribution a large quantity of valuable property, in accordance with the terms of said will, was [4] distributed to the Security-First National Bank of Los Angeles, a national banking association organized under the laws of the United States, with its principal office at Los Angeles, California, and to Margaret Bryan Smith, as trustees upon the trust therein set forth in accordance with the provisions of said will. Said Margaret Bryan Smith is the daughter of said decedent and the same person as Margaret Bryan Smith suing herein, in her individual capacity as plaintiff. Said trustees entered upon the discharge of their duties as such, and, ever since said date, they have been the duly appointed, qualified, and acting trustees of said trust.

III.

In and by the terms of said trust, as set forth in said order and decree of final distribution and in said will, there was no provision for any distribu-

tion, during the life of the plaintiff, to any beneficiary under said trust other than the plaintiff; and it was provided that, during the life of the plaintiff, the net income of said trust, computed as therein defined, should not be distributed as such to anyone but should be retained by the trustees and that, immediately upon its receipt, it should be added to the corpus of said trust, and that thereafter the said income should be considered as corpus. In and by the terms of said trust, as set forth as aforesaid, it was also provided that, beginning from the date of distribution of the estate of said deceased to the Trustees, the Trustees should pay the plaintiff, during her life, each year, monthly if possible, five per cent (5%) of the fair market value of the corpus of said trust estate so consisting and to consist of the original corpus and of any accretions thereto, and of any additions thereto by way of net income therefrom added thereto, said 5% to be computed on the market value of such corpus as determined by an annual appraisal at the times and in the manner set forth in said order and decree of distribution. The said provisions of said will are set forth [5] in detail in Article VII of said will (Exhibit A of Exhibit 1) and in that part of said order and decree of distribution designated therein as "Art. VII (of will)" (Exhibit B of Exhibit 1).

IV.

During the year 1944, the said Trustees received from the trust estate, net income as defined generally by the Internal Revenue Code which, minus any deductions provided for in subsections (b) and

(c) of said sec. 162 (there were no such deductions), exceeded \$18,356.36; and, during said year, they received from the trust estate, income in excess of \$18,356.36 which, under the applicable law of estates and trusts of the State of California, would have been considered income available for distribution to any life tenant, legatee, or beneficiary if the will or trust provisions and decree of distribution had provided for a distribution out of income. But, because the provisions of said trust and of said decree of distribution did not provide for any distribution to be made out of the income of said trust before the addition of such income to corpus and because, therefore, any distribution to plaintiff, as the sole beneficiary to whom distribution could be made in 1944, necessarily, according to the terms of said trust, was required to be made solely out of corpus so composed of both original or changed and changing corpus as aforesaid, there was no income received by the trustees, during said year 1944, which, during said year, under said order of distribution and the resulting applicable law of California as regards said trust, was, or could be, considered income available for distribution. Accordingly, pursuant to the said provisions of said trust, upon said income being received and derived by the trustees, during the year 1944, they immediately added the same to the corpus of said trust estate.

V.

Five per cent (5%) of the value of said trust estate computed under the provisions of said trust,

amounted to \$18,356.36 [6] for the year 1944; and, accordingly, under the provisions of said trust, during said year, the trustees paid to the plaintiff sums totaling \$18,356.36, out of said trust estate, which said sum was received by her during said year as aforesaid, but not out of income and only out of the original corpus or out of the changed and changing corpus of said trust estate, made up in accordance with the said provisions of said trust.

VI.

On or before March 15, 1945, to wit, on March 8, 1945, plaintiff duly filed with the defendant as United States Collector of Internal Revenue at Los Angeles, California, he and she being then and ever since residents of Los Angeles and citizens of the United States and of California, her income tax return for the year 1944. In said return she reported \$45,086.99 as her adjusted gross income for said year. Thereby she erroneously included therein said \$18,356.36 as income which she had received from said trust, whereas, in fact and in law, she had not received the same as an income distribution from said trust, and the same was not income received by her, but was a distribution to her solely out of said corpus of said trust as so constituted during said year, and she should not have included the same in said return at all. By reason of the premises she reported a tax computation of her income tax for said year in said return at \$22,388.23, which was a correct statement of said tax if said \$18,356.36 was includible in her income, whereas, in

fact and in law, her adjusted gross income should have been returned at \$26,730.63, without the inclusion of said sum, and her said tax should have been returned at \$8,513.82, which would be a correct statement of said tax if said sum is not includible in her income. A true copy of said return is set forth in Exhibit "C" constituting a part of said Exhibit 1, hereto attached.

VII.

Plaintiff, erroneously and in good faith, made estimates of [7] her income tax for the year 1944 and paid the amount of said estimates to the defendant on account of her income tax for said year, and thereby paid him on account of said tax the total sum of \$23,024.09, as follows:

On Apr. 12, 1944,.....	\$5,364.98
On June 1, 1944,.....	5,364.98
On Sept. 13, 1944,.....	5,364.98
On Jan. 13, 1945,.....	6,929.15
Total	<u>\$23,024.09</u>

Thereby the plaintiff erroneously overpaid her income tax for said year, and the defendant wrongfully, illegally, and erroneously received and collected an excessive amount in excess of the true amount legally and properly receivable and collectible from her, to the extent of the difference between said amount paid in the sum of \$23,024.09 and the amount which should have been paid in the sum of \$8,513.82, to wit, to the extent of \$14,510.27.

VIII.

Thereafter, promptly upon discovering said error, and on May 6, 1946, and within three years from the time of the payment of the first of said payments, and within three years from the time when said income tax return was filed, a claim by her for a refund of said \$14,510.27, as an overpayment and as an erroneous, illegal, and wrongful collection of income taxes from her by defendant, was duly filed by plaintiff with the Commissioner of Internal Revenue of the United States, by her filing the same with the defendant as Collector, as aforesaid, for said Commissioner, all of which was done according to the provisions of the laws of the United States in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, which said claim for refund presented the same grounds for such refund as those herein asserted. Thereafter, said claim was received by said Commissioner and disallowed by him in its entirety and said income tax return was accepted [8] and approved as rendered and plaintiff's tax assessed and determined by said Commissioner as therein returned. Thereby, the plaintiff was erroneously, illegally, unlawfully, and wrongfully required to pay \$14,510.27 more in income taxes for said year 1944 than were or are required by her by law. Thereafter, and on December 23, 1947, a notice of such disallowance of said claim for refund was mailed to the plaintiff by said Commissioner by registered mail, and this suit is brought after the expiration of more than six months from the date of the filing of

said claim and before the expiration of two years from the date of said mailing of said notice of said disallowance. A true copy of said Claim for Refund is hereto attached marked Exhibit 1. All of the facts stated in said Claim for Refund are true. A true copy of said notice of disallowance is hereto attached marked Exhibit 2.

IX.

In said return for the year 1944, plaintiff returned her said income tax at \$22,388.23 as aforesaid and the payment of \$23,024.09 as aforesaid, and she showed a resulting overpayment of only \$635.86. In said return plaintiff directed that said overpayment be credited on her 1945 estimated tax. This was accordingly done. But, except as above credited, no part of said overpayment of \$14,510.27 has ever been paid or credited and there is now justly due and owing from the defendant to the plaintiff the sum of \$13,874.41 as the unpaid balance of said overpaid and wrongfully collected excessive income taxes for the year 1944.

X.

The defendant and said Commissioner would concede that, except for the provisions of I. R. C. section 162, as amended in 1942 by the provisions now found in subdivision (d) thereof, the cases of *Helvering v. Pardee*, 290 U. S. 365 and *Burnett v. Whitehouse*, 283 U. S. 148, would apply and that the payment of said distribution to plaintiff in the sum of \$18,356.36 would be a receipt [9] by the plaintiff as a legatee and a receipt from corpus and

not a receipt of income. But the defendant and said Commissioner claim that, under said section as amended, said sum can be treated as paid and received out of income and taxable as such, and that said amendment is applicable although, according to the provisions of said trust, no part of such payment was to be made out of income before such income was made a part of corpus according to the terms of said trust. Plaintiff asserts, on the contrary, that (a) the provisions of said section, if attempting to apportion a distribution from a trust as between corpus and income, are unintelligible and provide no workable or understandable guide, or any guide, for making such apportionment; and that (b) if said section is susceptible of any construction which is intelligible, the formula therein set forth for such apportionment is not one providing fairly, accurately, substantially, or at all logically for any apportionment based upon any true, real, or probable income distributed or distributable, or upon any relationship between the contribution of income and corpus to any distribution, or for any apportionment except upon a purely arbitrary basis without support in any logic or reason; and that (c) it provides, by mere legislative fiat, that a payment which is not a distribution of income to a beneficiary of a trust can be treated as income and that a distribution of that which, in its inherent nature as well as that which by its designation as such according to the trust provisions, is corpus can be treated as a distribution of income. Thereby, by the application of said statute by defendant and by

said Commissioner in the premises, as so construed by them, plaintiff is denied the equal protection of the law and her property is taken without due process of law and she is taxed as under an income tax under XVIth amendment upon the basis of items not received as income being includible and included in income. Plaintiff further says that said statute, properly construed and to save its constitutionality, is limited, [10] at most, to an attempted apportionment of a distribution to a trust beneficiary as between corpus and income where, according to the terms of the trust and the resulting applicable law of the State of California concerning trusts, the distribution can be made out of income as such and not merely out of corpus some portion of which corpus is traced, or may be traceable, back to an addition or additions to original corpus from income whereby such income became merged in corpus and lost its character as income.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$13,878.41, together with interest thereon at the rate of six per cent (6%) per annum on \$1,578.48 thereof from June 1, 1944; on \$5,364.98 thereof from September 13, 1944, and on \$6,929.15 thereof from January 13, 1945, until the date of judgment herein, and for interest on the amount of said judgment until paid; and for her costs and for such other or further relief as may be proper.

Dated this 28th day of February, 1948.

/s/ RALPH W. SMITH.

State of California,
County of Los Angeles—ss.

Margaret Bryan Smith, being first duly sworn on her oath, deposes and says: that she is the plaintiff in the foregoing complaint; that she has read said complaint and knows the contents thereof and that the same is true of her own knowledge, except as to those matters which are therein stated on her information or belief, and as to those matters she believes it to be true.

/s/ MARGARET BRYAN SMITH,

Subscribed and sworn to before me this 28th day of February, 1948.

[Seal] /s/ BETTY K. CHAMBERS,
Notary Public in and for the County of Los Angeles, State of California. [11]

Exhibit No. 1

CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps, Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp: Received May 6, 1946, Coll.
Int. Rev., Los Angeles, Cal., Teller V.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Margaret Bryan Smith.

Business address: c/o Ralph W. Smith, 617 S.
Olive St., Los Angeles 14, Calif.

Residence: 710 South Orange Grove, Pasadena,
California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-
half of the taxpayer named, and that the facts given
below are true and complete:

1. District in which return (if any) was filed:
6th, California.

2. Period (if for income tax, make separate
form for each taxable year) from January 1, 1944,
to December 31, 1944.

3. Character of assessment or tax: Incomes taxes.

4. Amount of assessment, \$23,024.09; dates of
payment 4/12/44—6/1/44—9/13/44—1/13/45.

5. Date stamps were purchased from the Gov-
ernment

6. Amount to be refunded (or such greater sum
as is legally refundable): \$14,510.27.

7. Amount to be abated (not applicable to in-
come or estate taxes) \$ Interest thereon.

8. The time within which this claim may be legally filed expires, under Section 275 of the Revenue Act of 1942, on or about March 3, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

Note: See the typewritten portion of Claim for Refund on following pages 11, 12.

/s/ MARGARET BRYAN SMITH.

Sworn to and subscribed before me this 4th day of May, 1946.

[Seal]

RALPH W. SMITH,
Notary Public.

1. On the 18th day of September, 1938, John B. Bryan died leaving a Will, a copy of which is attached hereto as Exhibit A and is made a part of this claim for refund as completely as if set out in full herein.

2. The said Will was duly admitted to probate in the Superior Court of the State of California, in and for the County of Los Angeles, on the 21st day of September, 1938.

3. On December 29, 1943, the Superior Court of the State of California, in and for the County of Los Angeles, issued an Order settling the sixth and final account of Margaret Bryan Smith and Security-First National Bank of Los Angeles, as Executors, and for the payment of statutory fees and order for final distribution of the Estate of John B. Bryan, deceased, a copy of which is attached hereto

as Exhibit B, and is incorporated herein as completely as though fully set out herein.

4. In the above-mentioned Order and Decree for Final Distribution, a trust was set out in which Margaret Bryan Smith and the Security-First National Bank of Los Angeles were appointed as Co-Trustees.

5. In due course the Trustee began to function and to administer the trust, and the income and corpus of the trust were distributed to the beneficiaries of the trust. Among the beneficiaries of the trust was Margaret Bryan Smith, claimant in this claim for refund.

6. The paragraphs of the trust instrument which are pertinent to the present claim are the following:

“Article VII.

(of the Will, as set out in the Decree)

“Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorneys’ fees, expenses and liabilities incurred by [13] them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation, or distribution of said trust property, including a reasonable compensation to said Trustee for their

services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

“(a) The net income received and derived from the trust estate shall be by said Trustees, during the natural life of his daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of said trust and thereafter such income and profits shall be considered as principal of said trust.

“(b) Said Trustees, beginning from the date of the distribution of the estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to his said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to his said daughter, the said Trustees yearly on the anniversary date of his death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to his said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the Appraiser.

“(c) From and after the death of his said daughter the surviving Trustee shall pay and distribute the entire net income from said trust estate in equal parts, share and share alike, to the then living children of his said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, [14] so long as the last one of the children of his said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.”

7. Pursuant to the provisions of the above quoted paragraphs of the above-mentioned Decree, the Trustees of said Trust distributed to claimant, Margaret Bryan Smith, the sum of eighteen thousand three hundred fifty-six dollars and thirty-six cents (\$18,356.36) out of the corpus of said trust during the calendar year 1944.

8. Claimant made out an income tax return for the calendar year 1944.

Said income tax return and the income tax payments under it were received and accepted by the Treasury Department, Internal Revenue Service, and no part thereof has been refunded to the claimant.

9. Claimant reported the sum of \$45,086.99 as adjusted gross income in said return.

10. Claimant included in her income tax return for 1944 the sum of \$18,356.36, which she had received from the corpus of said trust, and denomi-

nated said sum as income received by her during the calendar year 1943. (See copy of income tax return attached hereto as Exhibit C.)

11. In fact and in law, Claimant should not have included said sum of \$18,356.36 as income to her in her income tax return for the calendar year 1944, because it was not income to claimant but was distributed to her as a distribution of corpus out of the corpus of said trust.

12. The claimant should have reported as adjusted gross income the sum of \$26,730.63.

13. A recomputation of claimant's income tax for the calendar year 1944 shows the following:

1. Enter amount shown in Item 5, page 1. This is your Adjusted Gross Income.. \$26,730.63
2. Enter Deductions (if deductions are itemized above, enter the total of such deductions, if adjusted gross income (line 1 above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500)..... 2,096.39
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income 24,634.24
4. Enter your Surtax Exemptions (\$500 for each person listed on item 1, page 1) 1,000.00

5. Subtract line 4 from line 3.
Enter the difference here. This is
your Surtax Net Income 23,634.24
6. Use the Surtax Table in instruc-
tion sheet to figure your Surtax on
amount entered on line 5. Enter
the amount here 7,789.80
7. Copy the figure you entered on
line 3, above. (If the line 3 in-
cludes partially tax-exempt inter-
est, see Tax Computation instruc-
tions) 24,634.24
8. Enter your Normal-Tax Exemp-
tion (\$500 if return includes in-
come of only one person; otherwise
see Tax Computation Instructions) 500.00
9. Subtract line 8 from line 7, and
enter difference here 24,134.24
10. Enter here 3 per cent of line 9.
This is your Normal Tax 724.02
11. Add the figures on lines 6 and 10,
and enter the total here. (If al-
ternative tax computation is made
on separate Schedule D enter here
tax from line 15 to Schedule D) .. 8,513.82
12. Enter here any income tax pay-
ments to a foreign country or
U. S. possession (attach Form
1116)

13. Enter here any income tax paid at source on tax-free covenant bond interest

14. Add the figures on lines 12 and 13 and enter the total here

15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax .. \$ 8,513.82

14. Claimant erroneously and in good faith paid as income taxes for the year 1944 the sum of \$23,024.09, as follows:

April 12, 1944.....	\$ 5,364.98
June 1, 1944.....	5,364.98
September 13, 1944.....	5,364.98
January 13, 1945.....	6,929.15
Total	<u>\$23,024.09</u>

15. The difference between the amount which claimant should have paid as an income tax for the calendar year 1944 and the amount she did pay as an income tax for said calendar year 1944 is the sum of \$14,510.27.

16. The above-mentioned overpayment of income tax was not required by the provisions of the Internal Revenue Code.

17. To interpret the provisions of the Internal Revenue Code as requiring claimant to pay an income tax on the said sum of \$18,356.36, which she received out of the corpus of the above-mentioned trust would be a violation of the Fifth and Six-

teenth Amendments to the Constitution of the United States, because——

(a) when the income from a trust is added to the corpus of the trust *ie* ceases thereafter to be income and becomes part of the corpus of the trust;

(b) distributions of the corpus of the trust to beneficiaries are not distributions of income to the beneficiary;

(c) distributions of the corpus of the trust to beneficiaries are received by the beneficiaries as legatees and devisees and not as income to the beneficiaries;

(d) no income tax may be imposed upon sums that are distributed out of the corpus of a trust;

(e) the clear intent of the trustor in the present trust was [17] to give to the beneficiary, claimant herein, portions of the trust corpus, as is clearly indicated by the paragraphs of the trust instrument quoted above;

(f) the intention of the trustor is controlling; and

(g) to consider distributions of corpus of a trust fund as distributions of income violates the sixteenth amendment and the fifth amendment to the Constitution of the United States.

18. Claimant has been informed that the above-mentioned overpayment of income tax was required by the Commissioner of Internal Revenue under the provisions of the Internal Revenue Code, section 162.

19. Claimant respectfully submits that the Internal Revenue Code, section 162, does not apply in any way to payments which are made to a beneficiary of a trust out of the corpus of that trust.

An analysis of the provisions of section 162 (d) Internal Revenue Code, clearly indicates that Congress was legislating in relation to the distribution of income. It was not legislating in relation to the distribution of corpus.

Claimant respectfully calls the attention of the Commissioner of Internal Revenue and of the Collector to the following authorities:

Mertens v. Rogan,

56 Fed. Supp. 450 at 451;

D.C.S.D., California, April 20, 1944;

Helvering v. Pardee,

290 U. S. 365;

Burnett v. Whitehouse,

283 U. S. 148;

Senate Finance Committee Report No. 1631;

77th Congress, Second Session, pages 59-60;

Frank H. Mason Trust v. Commissioner,

136 Fed. (2d) 335, 338; (C.C.A. 6th; 1943);

Cf. Mertens 1945 Pocket Supplement,

sections 36.21, 36.80.

The provisions of section 162, Internal Revenue Code, must [18] be interpreted so as to conserve the constitutionality of that section and, if possible, to

avoid the raising of the question of the constitutionality.

Crowell v. Benson,

285 U. S. 22, 62;

Ashwander v. Tenn. Valley Authority,

297 U. S. 288, 348 *semble*.

The law of California determines the validity and the meaning of the trust that is involved in this case.

Uterhart v. United States,

240 U. S. 598;

Blair v. Commissioner,

300 U. S. 5, 10.

Freuler v. Helvering,

291 U. S. 35, 44;

Mercantile Trust Co. v. Hofferbert,

58 Fed. Supp., 701, 703;

Estate of Gorham,

38 B.T.A. 1450, 1454.

Knowlton v. Moore,

178 U. S. 41;

Malgrem v. McColgan,

20 Cal. (2d) 424, 427.

The trust in the instant case was created in California and thus the law of the State of California controls the meaning, the validity, and the intention of the trust indenture and also determines the character and the validity of the interests which the beneficiary takes.

Under the law of California a valid trust "may be created for any purpose for which a contract may

be made," (Cal. Civil Code, Section 2220; *Hellman v. McWilliams*, 70 Cal. 449; *Estate of Reith*, 144 Cal. 314; *Reiss v. Reiss*, 45 C. A. (2d) 740, 746; hearing by Supreme Court denied); and a contract for the benefit of a third party is a valid contract (Cal. Civil Code, Section 1559; *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 708; *Sherwood & Sherwood v. Gill and Lutz*, 36 C. A. 707; *Pacific Ventura Corp. v. Huey*, 15 Cal. (2d) 711, 718). Hence, a trust agreement under which the Trustor conveys property to the Trustee who promises to give that property, in installments, to the beneficiary under the trust is in effect and actuality a contract for the benefit of a [19] third party and is a valid trust agreement (Cal. Civil Code, Section 2220).

The beneficiary under a trust, which has been created by the law of the State of California, has no property interest in either the corpus of or the income from the trust (Cal. C. C., section 863). The beneficiary has only a personal action against the trustee to enforce the performance of the trust (California Civil Code, Section 863; *Estate of Fair*, 132 Cal. 523; *Estate of Troy*, 214 Cal. 53, 56; *Anglo-California Bank v. Kidd*, 58 C. A. (2d) 651, 654 (1943). Hence, whatever income arises out of the trust, or accrues to the corpus of the trust, does not belong to the beneficiary as income because the trust and the beneficiary are separate and distinct persons for tax purposes. They are separate taxpayers (*Anderson v. Wilson*, 289 U. S. 20, 27; *Ardeghi v. Helvering*, 100 F. (2d) 406, 407, C. C. A. 2, 1938;

141 A.L.R. 1117, 1119, cites a long list of cases which accept and follow *Anderson v. Wilson*, *supra*.)

Furthermore, Section 163 of the Probate Code of California says:

“An annuity is a bequest of certain specified sums periodically . . .”,

and the Courts of California have kept the difference between an “annuitant” and an “income beneficiary” clear, sharp and distinct, (*Marre’s Estate*, 18 Cal. (2d) 184, 188 (1940); *Dasher’s Estate*, 53 C. A. (2d) 721, 724, 1942 *semble*; hearing by Supreme Court denied; *Mackay’s Estate*, 107 Cal. 303, 308; *Fraser v. Carman-Ryles*, 8 Cal. (2d) 143, 145; *Watson’s Estate*, 32 C. A. (2d) 594, 599; *Amphlett’s Estate*, 39 C. A. (2d) 551, 554; *Clayes v. Nutter*, 49 C. A. 142, 149; *Brown’s Estate*, 142 Cal. 450, 453, 455; *Estate of Roberts*, 27 A. C. 71, 78, and cases cited 1945; Cal. Probate Code, Sections 163, 163 (3).)

The leading cases are as follows:

Coleman Trust Co. et al., v. Commissioner,
3 T. C. 943 (1944); [20]

Helvering v. Butterworth,
290 U. S. 365;

Irvin v. Gavit,
268 U. S. 161 (1924);

Malgrem v. McColgan,
20 Cal. (2d) 424;

Belle Frankel,
3 T. C. 231; affirmed in
Frankel v. Commissioner,
144 Fed. (2d) 1023; C. A. A. 8;

Schenectady Trust Co., B. T. A. Memo.

Op. Dkt. 107,988, Sept. 9, 1942;

Northern Trust Co. v. Commissioner,

T. C. 1945, Docket No. 1647, 1760, P-h 1945
par 74,176, (Acquiescence, P-H, 145,
72,247);

Burnet v. Whitehouse,

283 U. S. 148;

Helvering v. Pardee,

290 U. S. 365;

Frank H. Mason Trust v. Commissioner,

136 Fed. (2d) 335; C. C. A. 6, 1943;

Union Trust Co. of Pittsburg v. Commis-
sioner,

115 Fed. (2d) 86, C. C. A. 3;

Union Trust Co. of Indianapolis,

111 Fed. (2d) 60, C. C. A. 7;

Brushaber v. Union Pacific Railroad,

240 U. S. 1, 24 (1916);

Heiner v. Donan,

285 U. S. 312, 326 (1923);

Nichols v. Coolidge,

274 U. S. 531 (Revenue Act of 1919);

Untermeyer v. Anderson,

276 U. S. 440 (Revenue Act of 1924);

Heiner v. Donnan,

supra; (Revenue Act of 1926);

Handy & Delaware Trust Co. v. Edwards,

285 U. S. 352;

Cf. Blodgett v. Holden,

275 U. S. 142; and

Barelay & Co. v. Edwards,

267 U. S. 442, 450.

These cases establish the following basic propositions of law: [21]

First: The income, from an estate or trust, which remains unchanged in character from the time that it is received by the Trustee until the time when it is distributed by the Trustee to the legatee or beneficiary, is received by the legatee or beneficiary as income to the legatee or beneficiary, at the time when the distribution is made to the legatee or beneficiary;

Second: Where the Trustor gives income to the beneficiary and intends that the income should be augmented by additions from the corpus of the trust, then the act of the Trustee, in adding the corpus to the income, changes the character of that which was corpus so that the former corpus is changed into income before the distribution is made to the beneficiary; and that all which the beneficiary receives is income from the trust at the time that the beneficiary receives it;

Third: If the Trustor intends that the beneficiary should receive an annuity which is to be a fixed charge upon the corpus of the trust, then that which the beneficiary receives is not income to him, even though the beneficiary receives other sums out of income in addition to the sums which he receives as an annuity out of the corpus.

Claimant respectfully submits that the application of the existing, established law to the facts in the present case must result in a holding and deter-

mination that the payments made by the Trustees to the claimant were payments which were made out of the corpus of the trust and not out of the income from the corpus of the trust and that, as to her, said payments were not income; and that in good faith she has made an overpayment of an income tax in the sum of \$14,510.27, which lawfully should be refunded to her, with interest on such payments from date of payment, as shown in [22] paragraph 14 hereof.

Certificate

I hereby certify that the claim for refund to which this certificate is attached was prepared by me on behalf of the claimant and that the facts stated therein are true and correct to the best of my knowledge and belief.

Dated at Los Angeles, California, this 4th day of May, 1946.

/s/ RALPH W. SMITH,
919 Oviatt Building, 617 South Olive Street, Los
Angeles 14, California. [23]

Exhibit A

Last Will And Testament of
John B. Bryan

In The Name of God, Amen:

I, John B. Bryan, a resident of and domiciled in the County of Los Angeles, State of California, being of lawful age and of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person whomsoever, do make, publish and declare this my Last Will and Testament and do hereby expressly revoke any and all former Wills and Codicils to such Wills and/or testamentary dispositions heretofore by me at any time made.

Article I.

Payment of Debts: I hereby direct that all my just debts, last illness and funeral expenses be paid as soon as practicable after my death.

Article II.

Natural Heirs and Specific Bequests: I declare that I am a widower and that I have living only one child, to wit, my beloved daughter, Margaret Bryan Smith, of Pasadena, California. To her I give, devise and bequeath all or so much of the following property owned by me at the time of my death:

(a) My home place, situate at 2210 Orlando Road, San Marino, California, and all furniture and furnishings of every kind and nature in

said home, and each and everything appurtenant thereto, including all automobiles.

(b) All the following described property and appurtenances thereto situate, lying and being in the City of Oakland, County of Alameda, State of California, to wit: Lot No. 23, in Block No. 2111, as said lot and block are delineated and so designated upon that certain map entitled "Map of the Alden Tract at Temescal," filed December 10, 1869, in the office of the County Recorder, Alameda County.

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Items (a) and (b) of this paragraph are more fully described and set forth in the petition terminating the joint tenancy, filed by me in the Superior Court of the State of California, in and for the County of Los Angeles.

(c) My former home and property situate at 2 Seneca Parkway, Rochester, New York, and all furniture and furnishings of every kind and nature in said home, and each and everything appurtenant thereto, including my automobile there.

(d) My personal effects, including jewelry, clothing, etc.

All the foregoing to be the property and estate of my daughter forever, providing she survives me. In the event of her predeceasing me I then give, devise and bequeath the property in this "Article II" described to my Trustees hereinafter named, to

be by them held in trust, as a part of the corpus of the trust estate herein created.

Article III.

Residue In Trust: I give, devise and bequeath all the rest, residue, and remainder of my properties and estate, whether real, personal or mixed, of whatsoever kind and character and wheresoever situate, which I hereby term the "Trust Estate," to Margaret Bryan Smith, and First Trust and Savings Bank of Pasadena, a corporation, as Trustees, and the survivor and/or successor of her or it, to be held in trust for the uses and purposes hereinafter set forth.

The said Trustees shall enjoy, have and possess and they are hereby vested with full, absolute and exclusive dominion and discretion over said trust property or any property forming a part of the corpus of said trust, except as hereinafter, in "Article V," limited and restricted, with full power to collect and receive all dividends, profits, interest, rents and other income of whatsoever nature accruing thereon or receivable

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therefrom, and are hereby authorized to invest, as herein limited and restricted, and reinvest and keep invested the whole or any part of the principal of said trust, as Trustees hereof.

Article IV.

Powers of Trustees: My Trustees, to carry out the express purposes of this trust, and in aid of its execution and the proper administration, management and disposition of the trust estate, subject only to the limitations and restrictions hereof, are specifically vested and clothed with the following powers, in addition to any other powers herein conferred:

(a) To possess, manage, control, grant, warrant, bargain, sell, convey, exchange, convert, encumber, mortgage, hypothecate, trade, loan, lease for a term or terms either within or beyond the duration of this trust, pledge, assign as collateral for a loan or otherwise, partition, divide, subdivide, syndicate, improve, loan, re-loan, invest and reinvest the said trust properties or any part thereof or any interest therein, at such time or times and in such manner, either public or private, and upon such terms as to them may seem in their absolute and uncontrolled judgment to be for the best interest of said trust, and may substitute other property for any portion thereof sold or otherwise disposed of, and invest the said trust properties in whatever form it may take in such securities and property as shall the best judgment of the said Trustees dictate.

(b) To execute and deliver proxies, options, powers of attorney, bills of sale, leases, deeds, agreements, satisfactions of liens, encumbrances, or mortgages and other instruments in

writing and any and all conveyances, by deed or otherwise, that the said Trustees may deem necessary or advisable in administering said trust and performing their duties and offices hereunder. Purchasers and other persons who shall pay any trust monies to said Trustees shall be exempt from all responsibility with respect to the application of the same and from the necessity in inquiring into the regularity, validity or

John B. Bryan

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propriety of any disposition made or purported to be made under the trust or powers contained in this instrument, provided the same upon its face does not appear to be irregular.

(c) To own, buy, sell, or hold real estate or personal property, whether tangible or intangible, anywhere without limit; to acquire and own stock in or entire charters of corporations; to borrow money for the trust, using and pledging the trust property for payment, and to engage the trust funds and properties in any kind of enterprise or investment which their judgment dictates for intended gain to the trust or otherwise. To grant options and sell properties of the trust at public auction, at a broker's board or at private sale for cash or upon credit and upon terms and conditions determined by them. To improve any real property subject to this trust, repair, alter, build or extend any

improvements thereon of such character, kind, amount, cost, and from such funds or property subject to this trust as they may deem advisable. To grant, make, renew or take leases of property even though the lease or renewal extends beyond the trust term, whether the rights and privileges are on, above or below the surface of real property, for any purpose, on a cash, deferred or installment payment, royalty, optional or other basis.

(d) To receive, invest and hold all real and personal property, stocks, bonds, or chattels at any time belonging to the trust estate in their name as Trustees, or said Trustees may hold all or any of said trust property in the name of any person they may elect, or in the name of a nominee or agent or in a street name, and shall not be responsible for any loss or liability for so doing. To vote, manage, sell and reinvest said trust property and every part thereof, either original or subsequent, or at any time held by them in such loans, securities and property, whether real or personal, as to the said Trustees may seem wise and expedient. All statutory requirements and other restrictions touching the investment of trust funds now or hereafter prescribed by law shall not be prohibitions, conditions or limitations upon the actions of the said Trustees. In this regard the Trustees in the management and investment of the trust may do any lawful thing which other citizens may do in any State or Country

in relation to the management and investment of property.

(e) To consent to the consolidation, merger, reorganization or other corporate change of any corporation whose securities form a part of this trust, or to the organization of a corporation and the exchange of any part of the trust

John B. Bryan

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properties for stock of any corporation. To consent or agree to the dissolution of any corporation of which the trust may at any time be a stockholder. To represent the trust in all suits or legal proceedings in any Court of law or equity or before any other body or tribunal; to employ counsel, to commence suits or proceedings, or to defend the same, and to release, compound, compromise, or submit to arbitration any and all claims and/or demands and all matters of dispute to which the trust or Trustees may be a party, or in which any trust property or any activity of any Trustee as such may be involved, whenever and in such manner as such Trustees in their judgment may deem proper and in the name of the trust or in the name of the Trustees.

(f) To employ, hire, engage, retain and contract for managers, agents, servants, help and employees and to discharge same.

The foregoing specifications of power and authority so granted to the Trustees shall not be deemed to be restrictions upon the general powers and discretions implied or given to the Trustees, nor limitations thereof, but the Trustees shall, in respect to all trust properties, whether tangible or intangible, held by them have unrestricted powers in respect thereto, subject to the limitations and restrictions specifically herein imposed upon the said Trustees in relation to the investment, reinvestment, administration and/or management of the trust estate.

Article V.

Restrictions and Limitations Upon Trustees: I hereby vest in my said Trustees all powers and authority expressly herein granted, and in addition thereto all powers and authority which a natural person may possess or exercise in relation to property, with the following limitation and restriction, that is to say, that no sale or other change (other than by operation of an instrument or by law) shall be made by the Trustees or the survivor of them, in the corpus of said trust and no investment or reinvestment of any part of the corpus of said

John B. Bryan

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including all withheld or accumulated income, shall at any time be made by the said Trustees without first having secured the written consent of a majority of the following named persons and the survivors of them and/or their successors in office:

Mrs. Margaret Bryan Smith, of Pasadena, California; George M. Wood, Esq., Theodore C. Briggs, Esq., Ezra Hale, Esq., and Arthur J. Gosnell, Esq., all of Rochester, New York; and Fred D. Moss, Esq., of Bancroft-Whitney Company, San Francisco, California.

The foregoing persons just named I designate as an Investment and Advisory Committee. I direct that said Committee be never less than three (3) persons and at such time or times when only two (2) persons compose said Committee that these two appoint another person as a member thereof; the Trustees to be immediately advised in writing of the name and address of the person or persons selected.

The registry of a letter properly addressed, with postage prepaid, to the last known address by the Trustees to any one or more of said persons composing the said Investment and Advisory Committee, requesting that said person act in writing in relation to the power or authority vested herein in such person relative to the subject matter of said trust, and the failure of the Trustees to receive a reply to said letter within a period of fourteen (14) days after posting same, shall be considered as an affirmative act and vote on the part of the addressee of said letter, and direction to the Trustees to act affirmatively in regard to the matter in said letter contained.

Article VI.

Suggestions to Trustees and Investment and Advisory Committee: Fully appreciating the uncertainties of the future

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and anticipating the difficulties in advising the type of investment in which the corpus, or any part thereof, of this said trust should flow, without attempting to place any additional limitations upon the investments and reinvestment of any part of the corpus, I suggest that no part of the corpus be invested or reinvested in purely Land, Building, Theatre or Irrigation stock or [26] bonds, or in the acquisition of Syndicate Interests, but that securities or obligations or unconditionally guaranteed obligations of the Government of the United States of America or of a Sovereign State be selected in preference to Obligations of Political Subdivisions of a Sovereign State. In the selection of common stocks, preferred stocks or bonds, it may be wisdom to select nationally known companies with AA rating or better, whose financial condition is satisfactory, and whose interest requirements were fully met for a long period of years immediately preceding the time of the investment.

No restriction is placed upon my Trustees in retaining in the trust any property that they might receive through distribution of my estate.

At the present time I am the President and Chairman of the Executive Committee of Bancroft-Whit-

ney Company, of San Francisco, California, and have been for many years directly interested in this company, and in the Lawyers-Cooperative Publishing Company of Rochester, New York. I possess unbounded faith in the integrity and competency of the officers of these companies and I am of the opinion that the stock which I own in these companies is and shall continue to be an excellent investment as a part of the corpus of the trust herein created. It is my hope, therefore, that profound consideration be given to the history, substance, merit, and prospective worth of these com-

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panies before any of my holdings therein be disposed of.

Article VII.

Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorneys' fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of said trust property, including a reasonable compensation to said Trustees for their services as Trustees hereunder. The remaining income shall be net in-

come, withheld, accumulated or payable as follows:

(a) The net income received and derived from the trust estate shall be by my said Trustees, during the natural life of my daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of the said trust and thereafter such income and profits shall be considered as principal of said trust.

(b) My said Trustees, beginning from the date of the distribution of my estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to my said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to my said daughter, the said Trustees yearly on the anniversary date of my death shall cause to have the then trust corpus appraised by a banking institution

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or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to my said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the appraiser.

(c) From and after the death of my said daughter it is then my wish and I direct that the

surviving Trustee pay and distribute the entire net income from said trust estate in equal parts, share and share alike, to the then living children of my said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, so long as the last one of the children of my said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.

(d) In the event that any one or more of the children now born or hereafter to be born to the said Margaret Bryan Smith should decease without issue or lineal descendants or issue her or him surviving or should leave issue and the said issue become extinct, the share [27] of the net income of the surviving child or children of the said Margaret Bryan Smith and the issue of any deceased child and lineal descendants of any deceased issue, per stirpes, shall be equally augmented thereby.

(e) Upon the death of the last living one, to wit, the last survivor of my daughter, Margaret Bryan Smith, and her now living children, Grace Patricia Smith and Margaret Joan Smith, it is then my wish and I direct that this trust must cease and terminate and my then Trustee forthwith transfer,

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grant, assign, and deliver, in equal parts and shares, the then corpus and all undistributed income of said trust estate to the then living issue, per stirpes,

of my daughter, Margaret Bryan Smith, and lineal descendants of any deceased issue of my said daughter, the lineal descendants taking by right of representation, thus winding up and forever terminating this trust. Should, at the time of the termination of this trust, no issue of my said daughter or lineal descendants of any deceased issue be then living, I then direct that the corpus of said trust, together with all accumulated income, be distributed to the then living blood heirs of Margaret Bryan Smith, to be determined by the laws of succession of the State of California now in force and effect.

Article VIII.

Any beneficiary of this trust, subject to the limitations hereof, shall have the right to purchase any of the trust property and otherwise to deal with the Trustees as freely as strangers to the trust, even though said beneficiary may also be a trustee hereof; and any beneficiary under this my Will and under the trust herein created shall not by reason thereof at any time be precluded from also being a trustee.

Article IX.

The term "Trustee" shall include the Original Trustees herein named, to wit, Margaret Bryan Smith, and the First Trust and Savings Bank of Pacadena, a corporation, and the survivor of them, and the Succeeding and/or Appointed Trustee herein nominated and/or selected, as follows:

It is my wish that one of the Trustees hereof at all times be a Corporate Trustee. Upon the death,

resignation, or disqualification of Margaret Bryan Smith, if at that time her oldest living child and issue of any deceased child has

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attained the age of twenty-one (21) years, I designate and appoint such oldest one of her children and the issue thereof as First Succeeding Trustee in the place and stead of my beloved daughter, Margaret Bryan Smith. If, upon the happening of that event the oldest living one of her children and issue of any deceased one of them has not attained the age of twenty-one (21) years, then I direct that my Investment and Advisory Committee nominate and appoint some person, not a corporation, to act as a Co-Trustee with the Corporate Trustee until the oldest child and issue of any deceased child of my said daughter attains the age of twenty-one (21) years, at which time such child or issue of any deceased child shall automatically replace the Trustee selected by my said Investment and Advisory Committee.

I direct at all times when possible one of the beneficiaries hereof also be a Trustee of the trust herein created and to this end I desire that at all times following the death, resignation or disqualification of my daughter, Margaret Bryan Smith, as a Trustee hereof, her oldest child and issue of any deceased child succeed in turn as the individual Trustee of the trust herein created.

Article X.

Restriction Upon the Power of Alienation: Each and every beneficiary under this my Will is hereby restrained from, and is and shall be without right, power and authority to sell, transfer, pledge, mortgage, hypothecate, encumber, alienate, anticipate, or in any other manner assign, affect or impair his or her beneficial and/or legal right, title, interest, claim and estate in and to the income and/or principal of the trust created and/or benefits conferred under this my Will, nor shall

John B. Bryan

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the right, title, interest and estate of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor libel to attachment or judgment or any process of law or court, bankruptcy proceedings or otherwise, and all of the income and/or principal under [28] the trust or benefits conferred in this my Will shall be transferable and payable only, solely and exclusively to the designated beneficiary and/or beneficiaries hereunder at the times entitled to take the same under this my Will, and the personal receipts of the designated beneficiary and/or beneficiaries hereunder or their duly authorized attorney or agent shall be a condition precedent to the payment or delivery of the same by said Trustees to each of such beneficiary or beneficiaries.

Article XI.

The profits and losses, if any, arising from any activity of the Trustees as such shall respectively inure to the benefit of or be chargeable against the trust and not the Trustees.

Article XII.

In the event that any provision or clause of this my Will shall be declared void, such fact shall not affect any other provision or clause herein and my said Will shall be read and interpreted as if such provision or clause so declared void had never been inserted herein.

Article XIII.

If the benefits to which any person may be entitled under the trust created herein shall, in the discretion of the Trustees, be insufficient to provide such person with suitable

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support, maintenance, comfort, education and reasonable expenses in case of illness, want, or other necessity, then said Trustees may pay to, apply or extend for the use and benefit of such person so much of the principal as the Trustees may deem advisable, but not to exceed such part of the principal as is proportionate to the share of income and corpus such person is at the time entitled to receive hereunder.

It is my desire that this be a trust for maintenance and I therefore direct that my Executors pay the income from my estate to my daughter and in

the event of her predecease, then to her children, beginning from the date of my demise and continuing until distribution of the trust estate to the Trustees.

Article XIV.

I direct that every gift, devise, bequest and interest given under this my will or any Codicil hereto shall be delivered free from all estate, succession and inheritance taxes and that such taxes be paid out of the residue of my estate.

Article XV.

In the event of the sale or transfer by the Corporate Trustee as a whole or substantially as a whole of its business or assets or of its liquidation or its being converted, merged, or consolidated with any other company, association or banking institution, the powers and privileges herein granted shall immediately cease and its successor, transferor or substitute shall have no right, title, interest or privilege as a Trustee hereunder; and I hereby vest in the oldest then living income beneficiary of the trust the power and authority to nominate and appoint another Corporate Trustee instead of the First Trust and Savings Bank of Pasadena, a corporation.

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Article XVI.

I direct that the Trustees hereunder shall annually prepare and file in the Superior Court, or such other court in which the probate of my estate is filed, in the County of Los Angeles, State of

California, a correct accounting and detailed report and statement of the transactions in relation to the trust property, and apply for confirmation thereof. Such report shall be similar to the proceedings now required by law of a guardian for a minor. The report shall specifically disclose the corpus of the trust, the annual disbursements and the gross and net income therefrom. After the death of my daughter a copy of this annual report or account, prior to the filing thereof, shall be personally delivered to or by registry mailed to each of the then living persons named in "Article V" hereof.

Article XVII.

I appoint as Executrix and Executor hereof my daughter, Margaret Bryan Smith, and the First Trust and Savings Bank of Pasadena, a corporation, and the survivor of them. I direct that my Executrix and Executor as well as my Trustees act without bond and that no undertaking at any time be required of either of them. [29]

In Witness Whereof, I have hereunto set my hand and seal this 29th day of May, 1937, at Los Angeles, California.

JOHN B. BRYAN.

The foregoing instrument, consisting of fourteen (14) pages, including this page, was on this 29th day of May, 1937, subscribed by John B. Bryan, the testator named therein, upon this and each of the preceding pages, and declared by him

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to be his Last Will and Testament in the presence of the undersigned persons, who have subscribed their names as witnesses to the execution of said Will at the request of said John B. Bryan, said Testator, and in his presence and in the presence of each other.

MARGUERITE Le SAGE

residing at 1207 Miramar,
Los Angeles, Calif.

J. EVERETT BLUM,

residing at 1823 Milan Ave.,
South Pasadena, Calif.

JOHN M. ROBINSON,

residing at 140 So. Roxbury
Dr.,
Beverly Hills, Calif.

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(Endorsed) No. 179740
Last Will and Testament
of

John B. Bryan

Dated, May , 1937

Filed Sep 21 1938

L. E. Lampton, County Clerk
By L. L. Smith, Deputy

Admitted to Probate Oct 13 1938

Attest: L. E. Lampton, County Clerk
By G. W. McDonald, Deputy

Codicil to Last Will and Testament.

I, John B. Bryan, of Los Angeles County, California, being of sound and disposing mind and memory, not acting under duress, menace, fraud or undue influence of any person whomsoever, do publish and declare this to be a Codicil to my Last Will and Testament executed on or about the 29th day of May, 1937:

First: I revoke the appointment of the First Trust and Savings Bank of Pasadena as co-executor of my Will and co-trustee of the trust created therein, and in its place and stead, I appoint the Security-First National Bank of Los Angeles, a national banking association, to be co-executor under my Will with my daughter Margaret Bryan Smith, and also to be co-trustee with her of the trust created in said Will; and I invest the said Security-First National Bank of Los Angeles with the same rights, powers and responsibilities, as co-executor with my daughter Margaret, and the same rights, powers and responsibilities as co-trustee, as those I have bestowed upon the First Trust and Savings Bank of Pasadena, in my Will.

I direct that the executor fees in my estate be divided equally between my co-executors, and I further direct that the compensation of the corporate co-trustee under the trust created in my Will, shall be as follows:

(a) An annual compensation for its ordinary or usual duties as co-trustee, a sum equal to one-half of one per cent ($\frac{1}{2}$ of 1%) of the value of the trust estate.

(b) A reasonable compensation for any unusual or extraordinary services rendered by it as co-trustee.

(c) At the time of the termination of said trust, a sum equal to one per cent (1%) of the then value of the principal of the trust estate, for the final distribution, closing and settlement of the trust.

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Second: Grace Patricia Smith is the natural daughter of my daughter Margaret, and Margaret Joan Smith is the adopted daughter of my said daughter Margaret.

In the construing of my Will, I direct that Margaret Joan Smith be considered and deemed to be the issue of the body of my daughter Margaret, and Margaret Joan Smith's issue, if any, be deemed and considered the issue of my daughter Margaret, the same as the issue of her daughter Grace Patricia Smith.

In Witness Whereof, I have hereunto set my hand this 17th day of June, 1938.

JOHN B. BRYAN.

The Foregoing Instrument, consisting of two pages, including the page signed by the witnesses, was at the date hereof by the said John B. Bryan signed, sealed, published and declared to be a Codicil to his Last Will and Testament, in the presence of us, who, at [31] his request and in his presence,

and in the presence of each other, have signed the same as witnesses thereto.

MARY V. ROOCH,

Residing at 774 So. Oakland
Ave.,
Pasadena, California.

DAVID D. STUART,

Residing at 260 So. Lorraine,
Los Angeles, Calif.

-2-

(Endorsed) No. 179740

Codicil to
Last Will and Testament of
John B. Bryan

Dated: June 17th, 1938

Filed Superior Court
1938 Sep 21 PM 1 54

L. E. Lampton
L. A. County Clerk
L. L. Smith, Deputy

Admitted To Probate
Oct 13 1938

Attest: L. E. Lampton, County Clerk
By G. W. McDonald, Deputy

Exhibit C

Form 1040

U. S. Individual Income Tax Return
For Calendar Year 1944

1944

Name : Margaret Bryan Smith

Address : 710 South Orange Grove Avenue
Pasadena 2, California

Your Exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.
Your name : Margaret Bryan Smith.
Margaret Smith, Daughter.

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruct'n 2.
Employer's Name : Security-First National Bank, executrix fees.
Where Employed : Los Angeles, California.....\$595.84
\$ 595.84
3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation)..... 21,975.44
4. If you received any other income, give details on page 3 and enter the total here..... 22,515.71
-
5. Add amounts in items 2, 3, and 4, and enter total here.....\$45,086.99
- Tax Due or Refund
6. Enter your tax from table on page 2, or from line 15, page 4\$22,388.23
7. How much have you paid on your 1944 income tax ?
(A) By withholding from your wages.
(B) By payments on 1944 Declaration of
Estimated Tax\$23,024.09
\$23,024.09
-
8. If your tax (item 6) is larger than payments (item 7), enter Balance of Tax Due here.
9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here.....\$ 635.86

If you filed a return for a prior year, what was the latest year? 1943
To which Collector's office was it sent? 6th, California
To which Collector's office did you pay amount claimed in item 7 (B), above? 6th, California

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Dated 3/8/45.

MARGARET BRYAN SMITH,
(Signature of Taxpayer)

Prepared without audit from data submitted by taxpayer,
Howell & Pedersen.

Schedule A.—[No data shown]

Schedule B.—Income From Rents and Royalties

1. Kind of property: Warehouse.
 2. Amount of rent or royalty \$4,800.00.
 3. Depreciation or depletion (explain in Schedule F) \$1,092.00
 4. Repairs (explain in Schedule G)
 5. Other expenses (itemize in Schedule G) \$1,034.62
- Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5).....\$2,673.38

Schedule C.—[No data shown]

Schedule D.—Gains and Losses From Sales or Exchanges
of Capital Assets, Etc.

1. Net gain (or loss) from sale or exchange of capital assets
(from separate Schedule D).....\$1,385.00

Schedule E.—Income From Partnerships, Estates and
Trusts, and Other Sources

Name and address of estate or trust Security-First
National BankAmount, \$18,356.36
Other sources: Trust.....Amount, 100.97
Total.....\$18,457.33

Total income from above sources (Enter as item 4, page 1)....\$22,515.71

Schedule F.—Explanation of Deduction for Depreciation
Claimed in Schedules B and C

1. Kind of property: Warehouse
 2. Date acquired 8/18/38 3. Cost or other basis \$36,400.00
- [Items 4, 5, 6—no data shown]
7. Estimated life used in accumulating depreciation 33⅓
- [Item 8—no data shown]
9. Depreciation allowable this year \$1,092.00.

Schedule G.—Explanation of Columns 4 and 5 of Schedule B,
and Lines 6, 14, and 17 of Schedule C

1. Column or Line No.	2. Explanation	3. Amount
5	Taxes	\$919.62
	Stationery	60.00
	Telephone and Telegrams	55.00

Deductions

Contributions

Church	\$200.00
Salvation Army	25.00
War Chest	125.00
Children's Home	25.00
Red Cross \$100.00 Christmas Seals \$10.00	110.00

Allowable Contributions (not in excess of 15 per cent
of item 5, page 1).....\$ 485.00

Taxes

Pasadena city & Los Angeles County.....	\$477.23
Orange County	128.68
Newport Beach	167.87
Automobiles	21.50
California income \$573.50 State sales \$142.62.....	716.12

Total Taxes 1,511.39

Miscellaneous

Accounting service	\$100.00
--------------------------	----------

Total Miscellaneous Deductions 100.00

Total Deductions\$2,096.39

Tax Computation—For Persons Not Using Tax Table on Page 2

1. Enter amount shown in item 5, page 1. This is your
Adjusted Gross Income\$45,086.99
2. Enter Deductions (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500)..... 2,096.39
3. Subtract line 2 from line 1. Enter the difference here.
This is your Net Income.....\$42,990.60
4. Enter your Surtax Exemptions (\$500 for each person listed in item 1, page 1)..... 1,000.00
5. Subtract line 4 from line 3. Enter the difference here.
This is your Surtax Net Income.....\$41,990.60
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter amount here..\$21,113.51
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)\$42,990.60
8. Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions) 500.00
9. Subtract line 8 from line 7, and enter difference here.....\$42,490.60

10. Enter here 3 per cent of line 9. This is your
Normal Tax\$ 1,274.72
11. Add the figures on lines 6 and 10, and enter the total
here. (If alternative tax computation is made on
separate Schedule D, enter here tax from line 15
of Schedule D)\$22,388.23

[Items 12, 13 and 14—no data shown]

15. Subtract line 14 from line 11. Enter the difference here
and in item 6, page 1. This is your tax.....\$22,388.23

Schedule D (Form 1040)

U. S. Treasury Department

Schedule of Gains and Losses From Sales or Exchanges of
(1) Capital Assets and (2) Property Other Than Capital Assets
(To Be Filed With the Collector of Internal Revenue With Form 1040)
For Calendar Year 1944
Or fiscal year beginning 1944 and ending 1945

Name of taxpayer Margaret Bryan Smith

Address 710 South Orange Grove Avenue, Pasadena 2, California

(1) Capital Assets

Long-Term Capital Gains and Losses—Assets Held for
More Than 6 Months

Distributions:

Mass. Inv. Trust	\$ 70.00	50%	\$ 35.00
State St. Inv. Corp.	2,700.00	50%	1,350.00

Total net long-term capital gain or loss (enter in line 2,
column 3, of summary below)\$1,385.00

Summary of Capital Gains and Losses

[Item 1—no data shown]

2. Total net long-term capital gain or loss....*\$1,385.00 **\$1,385.00

3. Net gain in column 5, lines 1 and 2. (Enter on line 1,

Schedule D, page 2, Form 1040).....\$1,385.00

[Item 4—no data shown]

* 3. Net gain to be taken into account from column 10, above.

** 5. Total net gain taken into account in columns 2, 3, and 4 of this
summary.

Computation of Alternative Tax—[no data shown]

(2) Property Other Than Capital Assets—[no data shown]

Exhibit No. 2
Treasury Department
Washington 25

Office of
Commissioner of Internal Revenue

Dec. 23, 1947.

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:CL:CC:Rej
Margaret Bryan Smith
710 South Orange Grove Avenue
Pasadena (2) California

In re: Claim for refund of \$14,510.27
For the year 1944

Dear Mrs. Smith:

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLARNEY,
Deputy Commissioner.

[Endorsed]: Filed March 18, 1948. [63]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and in answer to the plaintiff's complaint, admits, denies and alleges:

First Defense

I.

(a) Admits the allegations contained in paragraph I(a) of the complaint.

(b) Admits the allegations contained in paragraph I(b) of the complaint, except that it is denied that the tax paid by plaintiff, which plaintiff seeks to recover in this action, was an erroneous payment or an overpayment, and it is alleged that the income upon which the tax was imposed was not merely alleged income, but was true taxable income of plaintiff.

II.

Denies the allegations contained in paragraph II of the complaint except that it is admitted that John B. Bryan died September 8, 1938, a resident of California, leaving a will, and that the will was admitted to probate [64] by the Superior Court for Los Angeles County, California, and it is admitted that Exhibit 1 attached to the complaint is a true copy of the claim for refund except as to the Exhibits, and it is admitted that Margaret Bryan Smith, the plaintiff, is the daughter of John B. Bryan, deceased.

III.

Denies the allegations contained in paragraph III of the complaint.

IV.

Denies the allegations contained in paragraph IV of the complaint, except that it is admitted that the trustees under the will of John B. Bryan, deceased, received trust net income during 1944 in excess of \$18,356.36.

V.

Denies the allegations contained in paragraph V of the complaint, except that it is admitted that the trustees under the will of John B. Bryan, deceased, as such trustees, paid to plaintiff during 1944, sums totalling \$18,356.36.

VI.

Denies the allegations contained in paragraph VI of the complaint, except that it is admitted that on March 8, 1945, plaintiff filed with defendant as United States Collector of Internal Revenue at Los Angeles, California, both being residents of Los Angeles and citizens of the United States and California, her income tax return for the year 1944, showing gross income of \$45,086.99, which included \$18,356.36 which plaintiff had received from the trustees under the will of John B. Bryan, deceased, and that the said return showed tax due of \$22,388.23, and that Exhibit C attached to the complaint is a true copy of such return.

VII.

Denies the allegations contained in paragraph

VII of the complaint, except that it is admitted that plaintiff paid to defendant on account of the tax shown on her return for 1944, the amounts set forth. [65]

VIII.

Denies the allegations contained in paragraph VIII of the complaint, except that it is admitted that on May 6, 1946, plaintiff filed in the proper manner a claim for refund of taxes for 1944 in the amount of \$14,510.27, that the claim was disallowed in full by the Commissioner of Internal Revenue, and that notice of the rejection was given under date of December 23, 1947, and that Exhibit 1 attached to the complaint is a true copy of the claim for refund except as to the exhibits, and that Exhibit 2 is a true copy of the notice of rejection, and defendant denies the allegations contained in the claim for refund except insofar as similar allegations in the complaint are admitted in this answer.

IX.

Denies the allegations contained in paragraph IX of the complaint, except that it is admitted that in her return for 1944, plaintiff reported a tax due of \$22,388.23 and the payment of \$23,024.09, and showed an overpayment of \$635.86, which plaintiff directed be credited on her 1945 estimated tax.

X.

Denies the allegations contained in paragraph X of the complaint.

Second Defense

As a second and separate defense to the allegations contained in plaintiff's complaint, the defendant alleges that said complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, having fully answered, the defendant prays that he be hence dismissed with his costs in this behalf expended.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and

GEORGE M. BRYANT,
Assistant United States
Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau
of Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 15, 1948. [66]

[Title of District Court and Cause.)

STIPULATION OF FACTS

The parties hereto hereby stipulate and agree to the facts herein set forth and agree that the instant suit for the refund of income taxes paid to the Collector of Internal Revenue for the Sixth Collection District of California shall be submitted upon such stipulated facts and such argument as shall be offered in connection therewith. The execution and filing of this stipulation shall not preclude either party from offering and including such additional evidence as is not inconsistent therewith.

I.

John B. Bryan died on September 18, 1938, a resident of California, leaving a will, a true copy of which is attached hereto and marked "Exhibit A," to be incorporated herein as though set forth in full. Thereafter, said will in proceeding No. 179,740 in the Superior Court of the State of California, in and for the County of Los Angeles, [68] on October 13, 1938, was admitted to probate.

II.

Thereafter proceedings were had in the administration of said estate, and on or about January 13, 1944, the said Probate Court settled the Sixth and Final Account of the Executors of said will and directed a final distribution of the estate of the said John B. Bryan, deceased. A true copy of said order and decree is attached hereto and marked

Exhibit "B," to be incorporated herein as though set forth in full. By said order net assets in the sum of \$452,698.89 were distributed in accordance with the terms of said will to Margaret Bryan Smith and the Security-First National Bank of Los Angeles, a National banking association, as trustees upon the trust therein set forth in said will. Margaret Bryan Smith is a beneficiary of said trust as well as one of the trustees, and is the plaintiff in this action. She is the daughter of John B. Bryan, deceased. Since the distribution the said trustees have been serving as trustees of said trust.

III.

During the taxable year 1944, the trust received net income, after deductions, in the sum of \$24,348.14. Distributions made by the Trustees to beneficiary, Margaret Bryan Smith, during the taxable year 1944, totaled \$18,356.36, which sum was equivalent to 5% of the fair market value of the said trust estate as computed under the provisions of the trust.

IV.

The Fiduciary Income Tax Return filed by the co-trustees of the John B. Bryan Trust with the Collector of Internal Revenue for the Sixth Collection District of California, covering the taxable year 1944, reported total income in the sum of \$26,663.91. After deducting trust expenses in the sum of \$2,315.77, a deduction in the sum of \$18,356.36 being the amount distributed to beneficiary, Margaret Bryan Smith, during the year 1944, was

claimed by the fiduciaries in computing net income of the trust taxable to the fiduciary. [69]

Margaret Bryan Smith, beneficiary under the John B. Bryan Trust, in her Individual Income Tax Return for the taxable year 1944, reported gross income in the sum of \$45,086.99, which sum included the sum of \$18,356.36 distributed to her during the year 1944 under the terms of the said trust. Total tax liability reflected by the said return was \$22,388.23, against which liability Margaret Bryan Smith had made payments to the Collector of Internal Revenue for the Sixth District of California under the 1944 declaration of estimated tax in the sum of \$23,024.09, which resulted in an overpayment of \$635.86. By letter dated December 18, 1945, the said Collector advised Margaret Bryan Smith that computation of her alternative tax had reduced the total tax liability to \$22,083.53, thereby increasing her overpayment to \$940.56, which overpayment was credited to her 1945 estimated tax.

V.

On May 6, 1946, Margaret Bryan Smith filed a claim for refund of \$14,510.27, with the Commissioner of Internal Revenue on the ground that she had erroneously included the sum of \$18,356.36, received by her in 1944 as distributions under the John B. Bryan Trust, in reporting her gross income for the taxable year 1944. The said claim for refund was rejected by the Commissioner of Internal Revenue, and notice of such rejection was transmitted to Margaret Bryan Smith on December 23, 1947.

This action for refund of income taxes was commenced on March 18, 1948, by plaintiff who is the owner and holder of said claim for refund. Said claim for refund and said notice of claim rejection are referred to in Paragraph VIII of plaintiff's complaint and true copies are attached thereto.

Dated: This 6th day of June, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES D. PETTUS,
Special Attorneys, Bureau
of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Harry C. Westover, Collector of Internal Revenue for the 6th Collection District of California.

RALPH W. SMITH,
JOHN MOORE ROBINSON and
ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff,
Margaret Bryan Smith.

Trust No. TA-2048

This account is presented herewith, showing the condition of the trust estate and reporting the acts of the trustee. You are referred to the accompanying statement for details concerning these matters. Please study the whole account carefully, but note in particular the following: The investments made for the trust and the securities and/or properties of which the trust estate now consists: That the security and properties as received by the trustee and shown by its last account have been retained by it during the period covered by this account except as sale or other disposition, is shown by this statement. If any of the matters referred to are not clear to you, please advise us immediately.

Date	Items	Income Payments	Receipts Payments	Principal Receipts
1944 Jan. 31	Transferred from Probate Account A-1074, Estate of John B. Bryan, Deceased, per Court Order settling Final Account		\$39,391.39	
	Less: Paid to Margaret Bryan Smith as Income	\$17,112.09		
	Subsequent Disbursements chargeable to Principal,			
	Appraisal Fee	62.38		
	Cost of Certified Copy of Letters Testamentary	60		
	Balance Inheritance Tax and Interest	1,667.70		
	Cash in Term Savings Account	14,666.34		
			33,509.11	
				\$ 5,882.28

Date	Items	Income Payments	Receipts	Principal Payments	Receipts
Feb. 25	Transferred from Probate Account A-1074, Estate of John B. Bryan, Deceased: Income receipts subsequent to date of Court Order settling Final Account— 1/18/44: 350 Shs. American Tel. and Tel. Co. Dividend of 1/15/44 1/31/44: 700 Shs. General Electric Co. Dividend of 1/25/44 2/8/44: 20 Shs. Lanyer Publishing Co. Dividend of 2/1/44	\$	787.50 245.00 50.00		
Mar. 21	Transferred from Probate Account A-1074, Estate of John B. Bryan, Deceased: Income receipts subsequent to date of Court Order settling Final Account— 3/7/44: 50 Shs. Westinghouse Elec. Co. Dividend of 2/29/44 3/9/44: 9 Shs. Washington Ry. and Elec. Co. Dividend of 2/29/44 3/10/44: 5056 Shs. Lawyers Co-op. Publishing Co. Dividend of 3/10/44 3/14/44: 400 Shs. United States Steel Corp. Dividend of 3/3/44		50.00 2.03 2,022.40 400.00		
28	Federal and N.Y. State Transfer Tax on Various Securities Transferred from A-1074 Principal Cash Reserved for Closing Expense Less: Expended 1/17/44 cost of 4 Certified Copies of Court Order settling final a/c.....			\$	529.08 \$100.00 5.60

various stocks:

45.45

31 Transferred to Probate a/c A-1074

Amount necessary to complete payment of 1943

Federal Income Tax

53.93

Transferred from Probate a/c A-1074

Dividend of 3/15/44 on 900 Shs.

Bancroft-Whitney Co. \$675.00

And Extra dividend 225.00

900.00

Apr. 3 Postage and Insurance on various securities

22.11

4 Margaret Bryan Smith—Distribution

3,370.64

7 450 Shs. Eastman Kodak Company Common—No P.V.

10 Dividend payable 4/1/44

562.50

Transfer Tax on 50 Shs. Westinghouse Electric and

Mfg. Co. Common Stk.

1.75

13 Postage and Insurance from N.Y. on

.90

450 Shs. Eastman Kodak Co.

Margaret Bryan Smith

Payment to 4/13/44

1,685.32

14 Transfer Tax on 450 Shs. Eastman Kodak Co.

22.50

18 Transferred from A-1074

Refund of Federal Estate Tax and Interest thereon

5,305.52

19 2 Shs. Pacific Gas & Electric Co. Common—P.V. \$25

Dividend payable 4/15/44

3.00

25 Refund of N.Y. State Transfer Tax on

350 Shs. American Tel and Tel. Co.

10.50

Date	Items	Income Payments	Receipts	Principal Payments	Receipts
Apr. 28	Transferred from A-1074—Dividend to 4/15/44 on 350 Shs. American Tel. and Tel. Co. Capital P.V. \$100..... Cost of Postage and Insurance on shipment of Stock to Pasadena		787.50		.34 12.00
	Transfer Tax on 150 Shs. Henry Holt and Co.....				
May 2	700 Shs. General Electric Co. Common—No P.V. Dividend payable 4/25/44245.00		
10	\$2,500 Henry Holt & Company, Inc. 25 Yr. 5% Inc. Debs. Due 1/1/69				
12	Interest due 5/1/44..... Margaret Bryan Smith Payment—5/13/44		41.67		
29	L. A. County—1944 Personal Property Tax.....\$			1,685.32	
June 2	Dr. C. V. C. Comfort, Payment in full for professional services as witness in connection with tax litigation re: Estate of John B. Bryan, Deceased				
5	900 Shs. Bancroft-Whitney Co. Capital—No P.V. Dividend payable 6/1/44			150.00	
	Extra dividend		675.00		
	50 Shs. Westinghouse Electric Corp. Common—P.V. \$50 Dividend payable 5/30/44		225.00		
	Trustee's Fees		50.00		
	From 1/13/44 to 2/13/44 at 1/2 of 1% on 353,513.....		147.30		
	From 2/13/44 to 3/13/44 at 1/2 of 1% on 351,001.....		146.25		
	From 3/13/44 to 4/13/44 at 1/2 of 1% on 353,520.....		147.30		
	From 4/13/44 to 5/13/44 at 1/2 of 1% on 359,510.....		149.80		

June 6	Margaret Bryan Smith				
	Reimbursement of funds paid to Drs. Leon Campbell, James Harvey, and H. C. Bumpus in connection with determining Federal Estate Tax.....			150.00	
8	9 Units Washington Ry. & Elec. Co. Ctf. of Bene. Ownership of Common Stk. P.V. \$100				
	Dividend payable 5/31/44		2.02		
9	5056 Shs. Lawyers' Co-op. Publishing Co. of Rochester Common—No P.V.				
	Dividend payable 6/1/44		2,022.40		
13	Margaret Bryan Smith				
	Payment—6/13/44			1,685.32	
June 13	Trustee's Fees				
	From 5/13/44 to 6/13/44 at 1/2 % on 361,587.....	150.66			
15	400 Shs. United States Steel Corp. Common—No P.V.				
	Dividend payable 6/30/44		400.00		
July 7	450 Shs. Eastman Kodak Co. Common—No P.V.				
	Dividend payable 7/1/44		562.50		38.58
12	Refund on a/c Federal Income Tax 1940.....				
	Interest		7.28		
13	Margaret Bryan Smith				
	Payment—7/13/44			1,685.32	
	Trustee's Fees				
	From 6/13/44 to 7/13/44 at 1/2 % on 360,713.....	150.30			
	Transferred from Income to Principal.....	10,000.00			10,000.00
17	Term Savings Account Union Nat'l. Bank of Pasadena, Pasadena, Calif.				
	Interest to 6/30/44				
19	Revenue Stamps in payment of Federal Transfer Tax on Stock		56.67		.05

Date	Items	Income		Principal	
		Payments	Receipts	Payments	Receipts
July 21	350 Shs. American Tel. & Tel. Co. Capital—P.V. \$100 Dividend payable 7/15/44		787.50		
	2 Shs. Pacific Gas & Electric Co. Common—P.V. \$25 Dividend payable 7/15/44		1.00		
Aug. 2	700 Shs. General Electric Co. Common—No P.V. Dividend payable 7/25/44		245.00		
8	20 Shs. Lawyers' Co-op. Publishing Co. of Rochester 5% Cum. Pfd. P.V. \$100 Dividend payable 8/1/44		50.00		
11	Margaret Bryan Smith Payment—8/13/44			1,685.32	
	Trustee's Fees From 7/13/44 to 8/13/44 at 1/2% on 360,006.....	150.00			
Sept. 5	Additional Federal Income Tax for 1942			104.00	
	Interest to 9/1/44	9.13			
8	5056 Shs. Lawyers' Co-op. Publishing Co. of Rochester— Common—No P.V. Dividend payable 9/1/44		2,022.40		
9	Units Washington Ry. & Elec. Co. Ctf. of Bene. Ownership of Common Stk. P.V. \$100 Dividend payable 8/30/44		2.03		
50	Shs. Westinghouse Electric Corp. Common—P.V. \$50 Dividend payable 8/30/44		50.00		

Sept. 13	Margaret Bryan Smith				1,685.32
14	Payment—9/13/44				
	400 Shs. United States Steel Corp. Common—No. P.V.				
	Dividend payable 9/10/44			400.00	
	Trustee's Fees				
	From 8/13/44 to 9/13/44 at 1/2% on 360,190		150.08		
21	900 Shs. Baneroft-Whitney Co. Capital—No P.V.				
	Dividend payable 9/18/44			675.00	
	Extra Dividend			225.00	
Oct. 6	450 Shs. Eastman Kodak Co. Common—No P.V.				
	Dividend payable 10/1/44			562.50	
13	Margaret Bryan Smith				
	Payment 10/13/44				1,624.60
17	4 Shs. Pacific Gas & Electric Co. Common—P.V. \$25				
	Dividend payable 10/15/44			2.00	
19	350 Shs. American Tel. & Tel. Co. Capital—P.V. \$100				
	Dividend payable 10/15/44			787.50	
Nov. 3	700 Shs. General Electric Co. Common—No P.V.				
	Dividend payable 10/25/44			245.00	
6	\$2,500 Henry Holt & Co., Inc. 25 yr. 5% Inc. Debs.— Due 1/1/69				
	Interest due 11/1/44			62.50	
13	Margaret Bryan Smith				
	Payment—11/13/44				1,624.60
29	Trustee's Fees				
	From 9/13/44 to 10/13/44 at 1/2% on 391,366		163.07		
29	Trustee's Fees				
	From 10/13/44 to 11/13/44 at 1/2% on 390,895		162.87		
Dec. 4	50 Shs. Westinghouse Electric Corp. Common—P.V. \$50				
	Dividend payable 11/30/44			50.00	

Date	Items	Income Payments	Receipts	Principal Payments	Receipts
Dec. 8	9 Units Washington Ry. & Elec. Co. Ctf. of Bene. Ownership of Common Stk. P.V. \$100				
11	Dividend payable 11/30/44		2.02		
	5056 Shs. Lawyers' Co-op. Publishing Co. of Rochester—Common—No P.V.				
13	Dividend payable 12/1/44		2,022.40		
	Margaret B. Smith				
	Payment—12/13/44			1,624.60	
	Trustee's Fees				
14	From 11/13/44 to 12/13/44 at 1/2% on 391,019	162.92			
	400 Shs. United States Steel Corp. Common—No P.V.				
20	Dividend payable 12/10/44		400.00		
	900 Shs. Bancroft-Whitney Co. Capital—No P.V.				
	Dividend payable 12/15/44		675.00		
	Extra dividend		675.00		
27	Transferred from Income to Principal	8,000.00			8,000.00
	Co-Trustee's Fees				
	Margaret B. Smith allowed per Court order approving Trustee's 1st a/c	595.84			
28	5056 Shs. Lawyer's Co-op. Publishing Co. of Rochester—Common—No P.V.				
	Extra dividend 12/20/44		5,056.00		
Income Cash on Hand 12/31/44		\$20,292.42	\$26,411.74	\$19,448.47	\$29,331.28
Principal Cash on Hand		6,119.32		9,882.81	
		\$26,411.74		\$29,331.28	
			\$26,411.74		\$29,331.28

[Title of District Court and Cause.]

STIPULATION AMENDING EXHIBIT
ATTACHED TO COMPLAINT

It Is Hereby Stipulated Between the Parties that Exhibit "B" of Exhibit 1 attached to the complaint (which purports to be a copy of an order and decree of distribution prior to final settlement in the estate of Marcius C. Smith, sometimes known as Marcius Curtis Smith and as M. C. Smith, inadvertently attached to said Exhibit 1) may be amended by striking out the same and substituting the annexed copy of the order settling sixth and final account by Margaret Bryan Smith et al as executors in the matter of the estate of John B. Bryan, deceased, as Exhibit B of said Exhibit 1, which is a true copy of the order settling sixth and final account, etc., attached to the original claim for a refund; and that said Exhibit B is a true copy of the documents of which it purports to be a copy.

Dated: May 31st, 1949.

/s/ RALPH W. SMITH,
Attorney for Plaintiff.

/s/ E. H. MITCHELL,
Asst. U. S. Attorney. [98]

So ordered.

Dated this 13 day of May, 1949.

/s/ PEIRSON M. HALL. [99]

EXHIBIT B OF EXHIBIT No. 1

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 179740

Order Settling Sixth and Final Account by Margaret Bryan Smith and Security-First National Bank of Los Angeles, as Executors and for the Payment of Statutory Fees and Order for Final Distribution of Said Estate

In the Matter of the Estate of

JOHN B. BRYAN,

Deceased.

The Sixth and Final Account and Report of Margaret Bryan Smith and Security-First National Bank of Los Angeles, a national banking association, Executors of the above-entitled estate, came on regularly for hearing this 29th day of December, 1943, before the above-entitled Court, in Department 24 thereof, Honorable Thomas C. Gould presiding, David D. Stuart appearing as counsel for petitioners and all notices of said hearing having been duly given as required by law and no person appearing to except to or contest said account or petition, the Court after hearing the evidence finds that all the allegations of said account and petition are true and that said account and report is correct;

The Court further finds that the thirty-two shares of the Detroit Edison Company capital stock received by the Executors as dividends on the two

hundred shares of the North American Company, an asset of the estate and two shares of the Pacific Gas and Electric Company common stock received by them as dividends on the same two hundred shares of North American Company stock, are income and should be distributed along with the other income to the beneficiary entitled thereto under the will.

That the said Margaret Bryan Smith is the only heir at law of said decedent and that she and her daughters, Margaret Joan Smith and Grace Patricia Smith, now Grace Patricia Smith Tomaso, are now surviving. [100]

| That said account should be settled as rendered and final distribution of said estate ordered.

It Is Ordered, Adjudged and Decreed by the Court that Said account and report is hereby settled and approved and that said Executors have in their possession belonging to the estate, after deducting the credits to which they are entitled, assets in the sum of \$452,698.89, of which \$39,391.39 is in cash and the balance in the sum of \$413,307.50 is in assets other than cash. That the net income received during the accounting period is the sum of \$18,644.09, from which there should be deducted the 1942 Federal Income Tax in the sum of \$1,103.05 and the 1942 California Income Tax in the sum of \$387.45 and the 1943 Personal Property Tax in the sum of \$41.50. This leaves a net income for said accounting period available for distribution in the sum of \$17,112.09, which sum is hereby ordered distributed to Margaret Bryan Smith together with all additional

net income received from the termination of the accounting period to the date of this decree of final distribution. That said thirty-two shares of Detroit Edison Company capital stock and said two shares of common stock of the Pacific Gas and Electric Company, is ordered distributed to said Margaret Bryan Smith, and the Executors are further ordered to pay to themselves, as a balance of their statutory executor's fees, the sum of \$371.95 each, and to pay to their attorney, for the balance of his statutory fee, the sum of \$743.90.

It Is Further Ordered, Adjudged and Decreed that the balance of the estate, and all other property hereinafter discovered to belong to said estate, be distributed to Margaret Bryan Smith and the Security-First National Bank of Los Angeles, a national banking association, as Trustees, and the survivor and/or successor of her or it, to be held in trust for the uses and purposes hereinafter set forth:

Article III (of will)

The said Trustees shall enjoy, have and possess and they are hereby vested with full, absolute and exclusive dominion and discretion over said trust property or any property forming a part of the corpus of said trust, except as hereinafter, in "Article V," limited and restricted, with full power to collect and receive all dividends profits, interest, rents and other income of whatsoever nature accruing thereon or receivable therefrom and are hereby authorized to invest, as herein limited and restricted, and reinvest and keep invested the whole or any

part of the principal of said trust, as trustee hereof. [101]

Article IV (of will)

Powers of Trustees: Trustees, to carry out the express purposes of this trust, and in aid of its execution and the proper administration, management and disposition of the trust estate, subject only to the limitations and restrictions hereof, are specifically vested and clothed with the following powers, in addition to any other powers herein conferred:

(a) To possess, manage, control, grant, warrant, bargain, sell, convey, exchange, convert, encumber, mortgage, hypothecate, trade, loan, lease for a term or terms either within or beyond the duration of this trust, pledge, assign as collateral for a loan or otherwise, partition, divide, subdivide, syndicate, improve, loan, re-loan, invest and reinvest the said trust properties or any part thereof or any interest therein, at such time or times and in such manner, either public or private, and upon such terms as to them may seem in their absolute and uncontrolled judgment to be for the best interest of said trust, and may substitute other property for any portion thereof sold or otherwise disposed of, and invest the said trust properties in whatever form it may take in such securities and property as shall the best judgment of said trustees dictate.

(b) To execute and deliver proxies, options, powers of attorney, bills of sale, leases, deeds, agreements, satisfactions of liens, encumbrances, or mortgages and other instruments in writing and any and all conveyances, by deed or otherwise, that

the said Trustees may deem necessary or advisable in administering said trust and performing their duties and offices hereunder. Purchasers and other persons who shall pay any trust monies to said Trustee shall be exempt from all responsibility with respect to the application of the same and from the necessity in inquiring into the regularity, validity or propriety of any disposition made or purported to be made under the trust or powers contained in this instrument, provided the same upon its face does not appear to be irregular.

(c) To own, buy, sell, or hold real estate or personal property, whether tangible or intangible, anywhere without limit; to acquire and own stock in or entire charters of corporations; to borrow money for the trust, using and pledging the trust property for payment, and to engage the trust funds and properties in any kind of enterprise or investment which their judgment dictates for intended gain to the trust or otherwise. To grant options and sell properties of the trust at public auction, at a broker's board or at private sale for cash or upon credit and upon terms and conditions determined by them. To improve any real property subject to this trust, repair, alter, build or extend any improvements thereon of [102] such character, kind, amount, cost, and from such funds or property subject to this trust as they may deem advisable. To grant, make, renew or take leases of property even though the leases or renewal extends beyond the trust term, whether the rights and privileges are on, above or

below the surface of real property, for any purpose, on a cash, deferred or installment payment, royalty, optional or other basis.

(d) To receive, invest and hold all real and personal property, stocks, bonds, or chattels at any time belonging to the trust estate in their name as Trustees, or said Trustees may hold all or any of said trust property in the name of any person they may elect, or in the name of a nominee or agent or in a street name, and shall not be responsible for any loss or liability for so doing. To vote, manage, sell and reinvest said trust property and every part thereof, either original or subsequent, or at any time held by them in such loans, securities and property, whether real or personal, as to the said Trustees may seem wise and expedient. All statutory requirements and other restrictions touching the investment of trust funds now or hereafter prescribed by law shall not be prohibitions, conditions or limitations upon the actions of the said Trustees. In this regard the Trustees in the management and investment of the trust may do any lawful thing which other citizens may do in any state or country in relation to the management and investment of property.

(e) To consent to the consolidation, merger, reorganization or other corporate change of any corporation whose securities form a part of this trust, or to the organization of a corporation and the exchange of any part of the trust properties for stock of any corporation. To consent or agree to the dissolution of any corporation of which the trust may

at any time be a stockholder. To represent the trust in all suits or legal proceedings in any Court of law or equity or before any other body or tribunal; to employ counsel, to commence suits or proceedings, or to defend the same, and to release, compound, compromise or submit to arbitration any and all claims and/or demands and all matters of dispute to which the trust or Trustees may be a party, or in which any trust property or any activity of any Trustee as such may be involved whenever and in such manner as such Trustees in their judgment may deem proper and in the name of the trust or in the name of Trustees.

(f) To employ, hire, engage, retain and contract for managers, agents, servants, help and employees and to discharge same.

The foregoing specifications of power and authority so granted to the Trustees shall not be deemed to be restrictions upon the general powers and discretions implied or given to the Trustees, nor limitations thereof, but the Trustees shall, in respect to all [103] trust properties, whether tangible or intangible, held by them have unrestricted powers in respect thereto, subject to the limitations and restrictions specifically herein imposed upon the said Trustees in relation to the investment, reinvestment, administration and/or management of the trust estate.

Article V (of will)

Restrictions and Limitations Upon Trustees: Trustees are hereby vested with all powers and authority expressly herein granted, and in addition thereto all powers and authority which a natural

erson may possess or exercise in relation to property, with the following limitations and restriction, that is to say, that no sale or other change (other than by operation of an instrument or by law) shall be made by the Trustees or the survivor of them, in the corpus of said trust and no investment or reinvestment of any part of the corpus of said trust including all withheld or accumulated income, shall at any time be made by the said Trustees without first having secured the written consent of a majority of the following named persons and the survivors of them and/or their successors in office: Mrs. Margaret Bryan Smith, of Pasadena, California; George M. Wood Esq., Theodore C. Briggs, Esq., Ezra Hale, Esq. and Arthur J. Gosnell, Esq., all of Rochester, New York; and Fred D. Moss, Esq., of Bancroft-Whitney Company, San Francisco, California.

The foregoing persons just named are designated as an Investment and Advisory Committee. Said committee shall be never less than three (3) persons and at such time or times when only two (2) persons compose said committee these two shall appoint another person as a member thereof; the Trustees to be immediately advised in writing of the name and address of the person or persons selected.

The registry of a letter properly addressed, with postage prepaid, to the last known address by the Trustees to any one or more of said persons composing the said Investment and Advisory Committee requesting that said person act in writing in relation to the power or authority vested herein in such

person relative to the subject matter of said trust, and the failure of the Trustees to receive a reply to said letter within a period of fourteen (14) days after posting same, shall be considered as an affirmative act and vote on the part of the addressee of said letter, and direction to the Trustees to act affirmatively in regard to the matter in said letter contained.

Article VI (of will)

Suggestions to Trustees and Investment and Advisory Committee: [104]

Fully appreciating the uncertainties of the future and anticipating the difficulties in advising the type of investment in which the corpus, or any part thereof of said trust should flow, without attempting to place any additional limitations upon the investments and reinvestment of any part of the corpus, it is suggested that no part of the corpus be invested or reinvested in purely land, building, theatre or irrigation stock or bonds, or in the acquisition of syndicate interests, but that securities or obligations or unconditionally guaranteed obligations of the government of the United States of America or of a sovereign state be selected in preference to obligations of political subdivisions of a sovereign state. In the selection of common stocks, preferred stocks or bonds, it may be wisdom to select nationally known companies with A rating or better, whose financial condition is satisfactory, and whose interest requirements were fully met for a long period of years immediately preceding the time of the investment.

No restriction is placed upon my Trustees in retaining in the trust any property that they might receive through distribution of this estate.

At the time of making his will, deceased was the president and chairman of the executive committee of Bancroft-Whitney Company, of San Francisco, California, and had been for many years directly interested in this company, and in the Lawyers-Cooperative Publishing Company of Rochester, New York. He possessed unbounded faith in the integrity and competency of the officers of these companies and was of the opinion that the stock which he owned in these companies is and shall continue to be an excellent investment as part of the corpus of the trust herein created. It was his hope, therefore, that profound consideration be given to the history, substance, merit, and prospective worth of these companies before any of his holdings therein were disposed of.

Article VII (of will)

Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorney's fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of

said trust property, including a reasonable compensation to said Trustee for [105] their services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

(a) The net income received and derived from the trust estate shall be by said Trustees, during the natural life of his daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of said trust and thereafter such income and profits shall be considered as principal of said trust.

(b) Said Trustees, beginning from the date of the distribution of the estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to his said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to his said daughter, the said Trustees yearly on the anniversary date of his death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to his said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the Appraiser.

(c) From and after the death of his said daughter the surviving Trustee shall pay and distribute

the entire net income from said trust estate in equal parts, share and share alike, to the then living children of his said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, so long as the last one of the children of his said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.

(d) In the event that any one or more of the children now born or hereafter to be born to the said Margaret Bryan Smith should decease without issue or lineal descendants of issue her or him surviving or should leave issue and said issue become extinct, the share of the net income of the surviving child or children of the said Margaret Bryan Smith and the issue of any deceased child and lineal descendants of any deceased issue, per stirpes, shall be equally augmented thereby.

(e) Upon the death of the last living one, to wit, the last survivor of his daughter, Margaret Bryan Smith, and her now living children, Grace Patricia Smith and Margaret Joan Smith, this trust shall cease and terminate and the Trustee forthwith transfer, grant assign, and deliver, in equal parts and shares, the then corpus and all undistributed income of said trust estate to the then living issue per stirpes, of his daughter, Margaret Bryan Smith and [106] lineal descendants of any deceased issue of his said daughter, the lineal descendants taking by right of representation, thus winding up and forever terminating this trust. Should, at the

time of the termination of this trust, no issue of his said daughter or lineal descendants of any deceased issue be then living, the corpus of said trust, together with all the accumulated income shall be distributed to the then living blood heirs of Margaret Bryan Smith, to be determined by the laws of succession of the State of California now in force and effect.

Article VIII (of will)

Any beneficiary of this trust, subject to the limitations hereof, shall have the the right to purchase any of the trust property and otherwise to deal with the Trustees as freely as strangers to the trust, even though said beneficiary may also be a trustee hereof; and any beneficiary under this will and under the trust herein created shall not *be* reason thereof at any time be precluded from also being a trustee.

Article IX (of will)

The term "Trustee" shall include the original Trustee herein named, to wit, Margaret Bryan Smith, and the Security-First National Bank of Los Angeles, a national banking association, and the survivor of them, and the succeeding and/or appointed Trustee herein nominated and/or selected, as follows:

One of the Trustees hereof shall at all times be a corporate Trustee. Upon the death, resignation, or disqualification of Margaret Bryan Smith, if at that time her oldest living child and issue of any deceased child has attained the age of twenty-one (21) years, such one of her children and issue

thereof is designated and appointed as first succeeding Trustee in the place and stead of his daughter Margaret Bryan Smith. If, upon the happening of that event the oldest living one of her children and issue of any deceased one of them has not attained the age of twenty-one (21) years, then the said Investment and Advisory Committee is directed to nominate and appoint some person, not a corporation, to act as a Co-Trustee with the Corporate Trustee until the oldest child and issue of any deceased child of his daughter attains the age of twenty-one (21) years, at which time such child or issue of any deceased child shall automatically replace the Trustee selected by the said Investment and Advisory Committee.

At all times when possible one of the beneficiaries hereof also shall be a Trustee of the trust herein created and to this end at all times following the death, resignation or disqualification of his daughter, Margaret Bryan Smith, as a Trustee hereof, her oldest child and [107] issue of any deceased child shall succeed in turn as the individual Trustee of the trust herein created.

Article X (of will)

Restriction Upon the Power of Alienation: Each and every beneficiary under this Trust is hereby restrained from, and is and shall be without right, power and authority to sell transfer, pledge, mortgage, hypothecate, encumber, alienate, anticipate, or in any other manner assign, affect or impair his or her beneficial and/or legal right, title, interest,

claim and estate in and to the income and/or principal of the trust created and/or benefits conferred under this Trust, nor shall the right, title, interest and estate of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor liable to attachment or judgment or any process of law or court, bankruptcy proceedings or otherwise, and all of the income and/or principal under the trust or benefits conferred under this trust shall be transferable and payable only, solely and exclusively to the designated beneficiary and/or beneficiaries hereunder at the times entitled to take the same under this Trust, and the personal receipts of the designated beneficiary and/or beneficiaries hereunder or their duly authorized attorney or agent shall be a condition precedent to the payment or delivery of the same by said Trustees to each of such beneficiary or beneficiaries.

Article XI (of will)

The profits and losses, if any, arising from any activity of the Trustees as such shall respectively inure to the benefit of or be chargeable against the trust and the Trustees.

Article XII (of will)

In the event that any provision or clause of this Trust shall be declared void, such fact shall not affect any other provision or clause herein and said Trust shall be read and interpreted as if such provision or clause so declared void had never been inserted herein.

Article XIII (of will)

If the benefits to which any person may be entitled under the trust created herein shall, in the discretion of the Trustee, be insufficient to provide such person with suitable support, maintenance, comfort, education and reasonable expenses in case of illness, want or other necessity, then said Trustees may pay to, apply or expend for the use and benefit of such person so much of the principal as the Trustees may deem advisable, but not to exceed such part of the principal as is proportionate to the share of income and corpus such person is at the time entitled to receive hereunder.

This is a trust for maintenance and therefor the Executors are directed to pay the income from the estate to said Margaret Bryan Smith. [108]

Article XIV (of will)

Every gift, devise, bequest and interest given under this Trust shall be delivered free from all estate, succession and inheritance taxes and that such taxes be paid out of the residue of the estate.

Article XV (of will)

In the event of the sale or transfer by the Corporate Trustee as a whole or substantially as a whole of its business or assets or of its liquidation or its being converted, merged, or consolidated with any other company, association or banking institution, the powers and privileges herein granted shall immediately cease and its successor, transferor or substitute shall have no right, title, interest or

privilege as a Trustee hereunder; and the oldest then living income beneficiary of the trust is vested with the power and authority to nominate and appoint another Corporate Trustee instead of the Security-First National Bank of Los Angeles.

Article XVI (of will)

The Trustees are directed to annually prepare and file in the Superior Court, or such other court in which the probate of this estate is filed, in the County of Los Angeles, State of California, a correct accounting and detailed report and statement of the transactions in relation to the trust property, and apply for confirmation thereof. Such report shall be similar to the proceedings now required by law of a guardian for a minor. The report shall specifically disclose the corpus of the trust, the annual disbursements and the gross and net income therefrom. After the death of his daughter, Margaret Bryan Smith, a copy of this annual report or account, prior to the filing thereof, shall be personally delivered to or by registry mailed to each of the then living persons named in "Article V" hereof.

The compensation of the corporate co-trustee under the trust shall be as follows:

(a) An annual compensation for its ordinary or usual duties as co-trustee, a sum equal to one-half of one per cent ($1\frac{1}{2}$ of 1%) of the value of the trust estate.

(b) A reasonable compensation for any unusual or extraordinary services rendered by it as co-trustee.

(c) At the time of the termination of said trust, a sum equal to one per cent (1%) of the then value of the principal of the trust estate, for the final distribution, closing and settlement of the trust.

Grace Patricia Smith is the natural daughter of the said Margaret Bryan Smith, and Margaret Joan Smith is the adopted daughter of said Margaret Bryan Smith.

In the construing of this trust, Margaret Joan Smith is to be considered and deemed [109] to be the issue of the body of said Margaret Bryan Smith, and Margaret Joan Smith's issue, if any, shall be deemed and considered the issue of Margaret Bryan Smith, the same as the issue of her daughter, Grace Patricia Smith.

The assets of said estate now on hand, and so far as is known, are as follows:

Cash	\$39,391.39
350 Shares American Telephone & Telegraph Company Capital Stock P. V. \$100	47,600.00
900 Shares Bancroft-Whitney Company, Capital Stock—No. P. V.....	67,500.00
32 Shares Detroit Edison Company, Capital Stock P. V. \$20—carrying value included with North American Stock.	
450 Shares Eastman Kodak Company Common Stock—No. P. V.....	74,700.00

700 Shares General Electric Co., Common Stock—No. P. V.....	\$26,600.00
100 Shares Henry Holt & Company, Inc. Class "A" Stock, P. V. None.....	625.00
50 Shares Henry Holt & Company, Inc. Class "B" Stock—No. P. V.....	12.50
20 Shares Lawyers Co-op. Publishing Co. of Rochester, 5% Cumulative Preferred Stock, P. V. \$100.....	2,000.00
5056 Shares Lawyers' Co-op Publishing Company of Rochester, Common Stock No. P. V.....	164,320.00
200 Shares North American Company, Common Stock—No. P. V.....	3,350.00
2 Shares Pacific Gas & Electric Company, Common Stock, P. V. \$25, carrying value included with North American Stock).	
1000 Shares United Operating Trust Inc., Capital Stock—No P. V.	
400 Shares United States Steel Corporation, Common Stock—No. P. V.....	21,600.00
9 Units (Participating) Washington Rail- way & Electric Company Certificates for Participating Units of Beneficial Own- ership of Deposited Shares of Common Stock, P. V. \$100.	
50 Shares Westinghouse Electric & Manu- facturing Company Comon Stock, P. V. \$50.....	4,900.00

Decedents 1/16th interest in a Trust, Alexander Miller Trustee, said Trust holding ownership of the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, Township 28 S., Range 27 E., M.D.B. & M. In Kern County..... 100.00

Dated: January 13, 1944.

[Endorsed]: Filed October 5, 1949. [110]

In the District Court of the United States for the
Southern District of California Central Division

No. 8060-PH Civil

MARGARET BRYAN SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, 6th Collection District,
California,

Defendants.

MEMORANDUM

Hall, J.

Plaintiff's deceased father created a trust by will. It defined "net income" as the gross income received from trust properties less trust expenses, and provided that such net income during the life of the plaintiff should be added to the corpus of the trust and thereafter considered as principle of the trust. It was further provided that the trustees were to

pay plaintiff annually five percent of the fair market value of the corpus of the trust, which was to be determined annually upon appraisal in the manner set forth in the will.¹

In 1944 the net income of the trust was \$24,348.14, and there was distributed to the plaintiff for that year under the trust the sum of \$18,356.36, which was equivalent to 5% of the fair market [111-A] value of the corpus of the trust as computed under the provisions of the trust. The latter sum was de-

¹Article VII of the will reads as follows: "Article VII Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustee shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorneys' fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of said trust property, including a reasonable compensation to said Trustees for their services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

(a) The net income received and derived from the trust estate shall be by my said Trustees, during the natural life of my daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of the said trust and thereafter such income and profits shall be considered as principal of said trust.

(b) My said Trustees, beginning from the date of the distribution of my estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to my said daughter, Margaret

ducted by the trust in its tax return, but was included in the gross income of the plaintiff in computing her individual income tax for the year 1944. [112]

Plaintiff seeks herein to recover that portion of her 1944 income tax which was paid upon the calculation which included said \$18,356.36 in her gross individual income. Her contention rests upon the claim that the sum received was a bequest of principal of the trust and not a distribution of income.

Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust in determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to my said daughter, the said Trustees yearly on the anniversary date of my death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to my said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as appraiser.

(c) From and after the death of my said daughter, it is then my wish and I direct that the surviving Trustee pay and distribute the entire net income from said trust estate in equal parts, share and share alike, to the then living children of my said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, so long as the last one of the children of my said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.

(d) In the event that any one or more of the children now born or hereafter to be born to the said Margaret Bryan Smith should decease without is-

Both parties agree that if this is true the plaintiff is entitled to recover.

The plaintiff argues strenuously that under the law of California the provisions of the will make the income of the trust corpus, and that hence whatever was paid to the plaintiff was not from income and was not taxable to her as income. Doubtless that is true for all purposes of California law. On that I express no opinion, because the Federal Statute controls, if applicable.

sue or lineal descendants of issue her or him surviving or should leave issue and the said issue become extinct, the share of the net income of the surviving child or children of the said Margaret Bryan Smith and the issue of any deceased child and lineal descendants of any deceased issue, per stirpes, shall be equally augmented thereby.

(e) Upon the death of the last living one, to wit, the last survivor of my daughter, Margaret Bryan Smith, and her now living children, Grace Patricia Smith and Margaret Joan Smith, it is then my wish and I direct that this trust must cease and terminate and my then Trustee forthwith transfer, grant, assign, and deliver, in equal parts and shares, the then corpus and all undistributed income of said trust estate to the then living issue, per stirpes of my daughter, Margaret Bryan Smith, and lineal descendants of any deceased issue of my said daughter, the lineal descendants taking by right of representation, thus winding up and forever terminating this trust. Should, at the time of the termination of this trust, no issue of my said daughter or lineal descendants of any deceased issue be then living, I then direct that the corpus of said trust, together with all accumulated income, be distributed to the then living blood heirs of Margaret Bryan Smith, to be determined by the laws of succession of the State of California, now in force and effect."

Sec. 162 (d) was enacted as part of the Internal Revenue Act of 1942. As stated in *Coleman v. Commissioner*, C. C. A. 3, 151 Fed. (2nd) 235, at 238 "The Congressional Committee Reports show clearly that the law, as declared in the Whitehouse (*Burnett v. Whitehouse*, 283 U. S. 149) and *Pardee* (*Helvering v. Pardee*, 290 U. S. 365) cases, was intended to be changed by the 1942 amendment." The constitutionality of that Section is not challenged by the plaintiff. Subdivision (1) thereof, [26 U.S.C. 162 (d), (1)] is directly applicable here. The pertinent portion of that section reads as follows:

"Amounts distributable out of income or corpus: In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed . . . during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year." [113]

Under the plaintiff's theory there can be no "distributable income" to the plaintiff because of the provisions requiring the income to be added to the corpus and that 5% of the total be distributed to the plaintiff. The Statute must be read in light of the intention of Congress. Or as Justice Cordoza so aptly put it in *Burnet v. Wells*, 289 U. S. 670 at 675: "One can read in the provisions of the Rev-

enue Acts the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens."

To *acceed* to the plaintiff's contention would be to not only disregard the plain intent of Congress, but also to misconstrue the language of the Statute. A provision in a will cannot change the character of the actual earnings of a trust estate after death of the testator under the Internal Revenue laws by simply changing the name of the earnings from income to corpus either upon the receipt of the earnings or at the time of an annual appraisal. As I read the Statute it comes to this; if there actually was income, and if any money was distributable, and the money distributable and distributed, was less than the income, then it was "distributable income" within the meaning of the Statute, and is taxable to the recipient.

Under such construction there would be no actual invasion of the corpus of the trust as it existed on the date of death, and thus no double taxation.

In the instant case the trust actually earned and received as gross [114] income during the year 1944, the sum of \$26,663.91, from which costs and expenses were deducted leaving a net income of \$24,348.41. The will recognizes that the earnings would be "gross income," and that there would be "net income," as it provides in so many words that, "From the gross income * * * the Trustees shall first fully pay and discharge any and all," taxes,

costs, attorney fees, expenses and the like, and that, "The remaining income shall be net income withheld, accumulated or payable" to the plaintiff as hereinbefore indicated during her lifetime, with other provisions for payment after her death of the income. The five per cent (5%) payable to the plaintiff for the year 1944 was the sum of \$18,356.36. It was "distributable" and was distributed to the plaintiff. It was a sum less than the "net income" of the trust, and did not require an invasion of the corpus of the trust as it existed on the date of the testators death, and is thus taxable to the plaintiff under the terms of Section 162 (d), (1), of the Internal Revenue Code.

Judgment will be for the defendant, who will prepare the customary Findings, Conclusions and Judgment.

Los Angeles, California, February 20, 1950.

/s/ PEIRSON M. HALL.

[Endorsed]: Filed February 20, 1950. [115]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on for trial before the Court, sitting without a jury, on June 13, 1949, the Honorable Peirson M. Hall, Judge, presiding. The plaintiff, Margaret Bryan Smith, appeared by Ralph W. Smith, John Moore Robinson, and Robert Himrod, by Robert Himrod, of counsel, and the defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, appeared by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District; Eugene Harpole and James D. Pettus, Special Attorneys, Bureau of Internal Revenue, as counsel. The Court having considered the evidence and the briefs of counsel, makes the following:

Findings of Fact

I.

The facts set forth in the stipulation of the parties dated June 6, 1949, are found to be true, and are incorporated herein as though [116] set out in full.

Conclusions of Law

From the foregoing Findings of Fact the Court draws the following conclusions of law:

I.

The Court has jurisdiction of both the parties and the subject matter of this case.

II.

The suit arises under and is governed by the provisions of Section 162(d)(1) of the Internal Revenue Code.

III.

During the taxable year 1944, the John B. Bryan Trust had distributable income, within the meaning of Section 162(d)(1) of the Internal Revenue Code, in excess of the distributions made to beneficiary, Margaret Bryan Smith.

IV.

The distributions in the sum of \$18,356.36 received by plaintiff during the taxable year 1944 as beneficiary of the John B. Bryan Trust constituted distributions of income fully taxable to plaintiff as recipient.

V.

The sum of \$18,356.36 distributed to plaintiff during 1944, as beneficiary of the John B. Bryan Trust, was properly included in the gross income reported on plaintiff's Individual Income Tax Return for the year 1944, and the tax paid thereon was neither illegally nor erroneously collected by the Collector of Internal Revenue.

VI.

Plaintiff's claim for refund in the sum of \$14,510.27, filed on May 6, 1946, was properly rejected by the Commissioner of Internal Revenue.

Under all the evidence and law, judgment should be and is [117] hereby given for the defendant with costs assessed against the plaintiff.

Dated: This 18 day of April, 1950.

/s/ PEIRSON M. HALL,

United States District Judge.

Approved as to Form:

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,

Attorneys for Plaintiff.

[Endorsed]: Filed April 18, 1950. [118]

The United States District Court Southern District
of California Central Division

No. 8060-PH Civil

MARGARET BRYAN SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, 6th Collection District,
California,

Defendant.

JUDGMENT

The above-entitled case came on for trial before the Court, sitting without a jury, on June 13, 1949, the Honorable Peirson M. Hall, Judge, presiding. The plaintiff, Margaret Bryan Smith, appeared by Ralph W. Smith, John Moore Robinson, and Robert Himrod, by Robert Himrod, of counsel, and the defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, appeared by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District; Eugene Harpole and James D. Pettus, Special Attorneys, Bureau of Internal Revenue, as counsel.

The Court having considered the evidence and the briefs of counsel, and having rendered its decision and made and filed its Findings of Facts and Conclusions of Law, and ordered that judgment

be entered in favor of defendant in accordance with said Findings and Conclusions.

Now, Therefore, by virtue of the law and by reason of the [119] Findings and Conclusions as aforesaid, it is considered by the Court and ordered that defendant recover judgment against plaintiff for its costs to be taxed by the Clerk of this Court and for dismissal of the action. Costs taxed in the sum of \$20.00.

Judgment rendered this 18th day of April, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to Form:

RALPH W. SMITH,
JOHN MOORE ROBINSON and
ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff.

Judgment entered April 18, 1950.

Docketed April 18, 1950.

[Endorsed]: Filed April 18, 1950. [120]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Plaintiff, Margaret Bryan Smith, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment for Defendant and the whole thereof, entered in the above entitled action on April 18, 1950, in Judgment Book No. 65, page 326.

Dated: This 12th day of May, 1950.

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1950. [121]

[Title of District Court and Cause.]

DESIGNATION AND CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

Appellant hereby designates for inclusion in the record on appeal in the above entitled proceedings, the following:

All the matters required by subdivision G of Rule 75 of the Federal Rules of Civil Procedure, including the following: All the pleadings, all papers and records, all stipulations entered into and all stipulations of fact, the judgment entered in favor of defendant, Appellant's Notice of Appeal, and this Designation of Contents of Record on Appeal.

Dated: This 12th day of May, 1950.

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1950. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 124, inclusive, contain the original Complaint; Answer; Stipulation of Facts; Stipulation Amending Exhibit Attached to Complaint; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Designation of Record on Appeal and full, true and correct copy of minute order Entered June 13, 1949, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 22nd day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12588. United States Court of Appeals for the Ninth Circuit. Margaret Bryan Smith, Appellant, vs. Harry C. Westover, United States Collector of Internal Revenue, Sixth Collection District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12588

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, 6th Collection District,
California,

Appellee.

STIPULATION AS TO CONTENTS OF
RECORD TO BE PRINTED

It Is Hereby Stipulated and Agreed by Appellant and Appellee through their respective counsel that the following portions of the record are necessary for consideration of the questions presented on appeal and shall be printed:

1. Page 2—Names and addresses of attorneys.

2. Pages 3-63, omitting pages 33-56, inclusive—Complaint and Exhibits, but omit title of Court and Cause.

3. Pages 64-66, inclusive—Answer, but omit title of Court and Cause.

4. Pages 68-70, omit pages 71-90 inclusive, include pages 91-96, inclusive—Stipulation of Facts. Omit title of Court and cause.

5. Pages 98-110, inclusive—Omit title of Court and Cause. Stipulation Amending Exhibit Attached to Complaint.

6. Pages 111-115, inclusive—Memorandum of Decision, omitting title of Court and Cause.

7. Pages 116-118, inclusive—Findings of Fact and Conclusions of Law, omitting title of Court and Cause.

8. Pages 119-120, inclusive—Judgment. Omitting title of Court and Cause.

9. Page 121—Notice of Appeal.

10. Page 123—Designation of Contents. Omitting title of Court and Cause.

Clerk's Certificate.

Dated: June 22, 1950.

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,

Attorneys for Plaintiff-
Appellant.

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant United States
Attorneys,

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau
of Internal Revenue,

By /s/ EUGENE HARPOLE,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed June 23, 1950.

